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V.5

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

TRINITY TERM, 1847, TO EASTER TERM, 1848.

—◆—
BY ALFRED DOWLING,

SERJEANT AT LAW,

AND JOHN JAMES LOWNDES,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

—◆—
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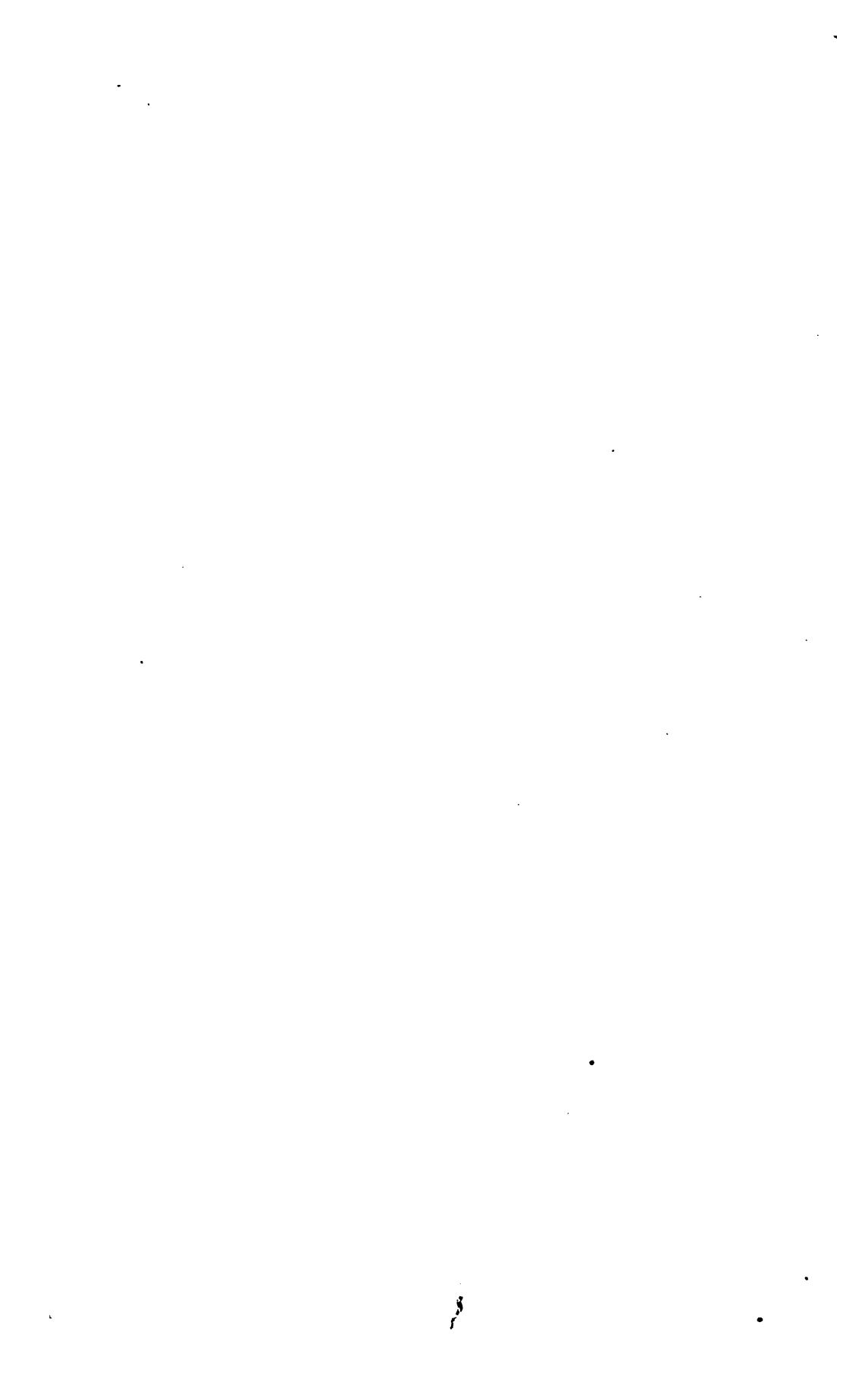
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Page 39, note (a), for "1 M. & G." read "1 M. & G."



REPORTS OF CASES
DETERMINED ON
POINTS OF PRACTICE.

COURT OF QUEEN'S BENCH.

Trinity Term.

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

JOEL v. DICKER.

1847.

A RULE had been obtained in Hilary Term last, calling upon the plaintiff to shew cause why the warrant of attorney given by the defendant in the above cause should not be cancelled, and why the judgment signed thereon, and all subsequent proceedings, should not be set aside.

It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf; it is sufficient

if, of his own free will, he adopts an attorney suggested by the plaintiff. Nor is it necessary that the attorney should be cognizant of the facts under which the warrant of attorney is given, or that he should consult with the defendant in private, previous to signing; it is enough if the attorney be there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withhold from the attorney the necessary information.

Where judgment had been signed on a warrant of attorney, the defeasance of which did not contain the true terms of the agreement upon which it was to be void, pursuant to Reg., M. T., 42 Geo. 3; and the judgment appeared to have been signed before certain bills of exchange, for which it was given as collateral security, had become due; the Court referred it to the Master to ascertain what was due to the plaintiff, and ordered that upon payment of that sum, and the costs of the proceedings, the bills of exchange should be delivered up to the defendant, and satisfaction should be entered on the judgment.

The omission to comply with the Reg., M. T., 42 Geo. 3, which requires the attorney preparing the warrant of attorney to cause the "defeasance to be written on the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance," does not render the warrant void as between the parties.

1847.

JOEL
v.
DICKER.

The grounds upon which this rule was moved were—first, that certain bills of exchange, which were given with the warrant of attorney, ought to have been delivered up before judgment was signed on the warrant. Secondly, that the terms of agreement upon which the warrant of attorney was to become void, were not truly stated in the defeazance. And thirdly, that the attestation was defective by reason of the attesting attorney not having been duly nominated.

[The facts of the case are so fully set out in the judgment of the Court, that it is thought unnecessary to repeat them here.]

In Easter Term,

Petersdorff shewed cause. As to the first objection, he submitted that the bills had never been circulated, and that it was within the intention of the parties that the judgment should be signed before the bills became due. As to the second, he contended, that even supposing the terms of the agreement between the parties were not fully stated in the defeazance, according to the Reg., M. T., 42 Geo. 3, K. B. (a), that omission did not avoid the instrument, but merely rendered the attorney answerable, on motion, for the neglect of the duty imposed upon him by the Court; *Shaw v. Evans* (b), per Lord *Ellenborough*, C. J.; *Partridge v. Fraser* (c); *Sansom v. Goode* (d). And that the provisions of the 3 Geo. 4, c. 39, s. 4, and 1 & 2 Vict. c. 110, s. 60, only extended to make the warrant void as against the assignees of the defendant, if he became bankrupt or insolvent, and not as between the parties themselves; *Morris v. Mellin* (e). As to the third point, he argued that it did not matter from whom came the suggestion of the attesting attorney's name, if the defendant had an opportunity of exercising a free choice in the selection of the

(a) 2 East, 136.

(b) 14 East, 576, 578.

(c) 7 Taunt. 307; S. C. 1 Moore, 54.

(d) 2 B. & A. 568; S. C. 1 Chitt.

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(e) 6 B. & C. 446; S. C. 9 D. & R. 503.

attorney, and did in fact exercise it, which he contended was the case in the present instance. He referred to *Taylor v. Nicholl* (a); *Hale v. Dale* (b); and *Pease v. Wells* (c).

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Corrie, in support of the rule. As to the first point, although power was given by the warrant of attorney to sign judgment, whether the bills were paid or not, yet such could not have been the intention of the parties; and therefore the Court would not allow the judgment to stand. As to the second point, he admitted that the warrant was not void, for not containing the true agreement in the defeazance; but argued that the Court would treat it at least as an irregularity, according to the view taken of it by *Mansfield, C. J.*, in *Morell v. Dubost and Another* (d). As to the third point, he said that the object of the statute in requiring the attendance of an attorney was, that the party signing should have the benefit of his advice and counsel; and that here the defendant had had no opportunity of conversing with the attorney in private as had been done in two of the cases referred to by the other side; and he cited *Barnes v. Pendrey* (e), and *Gripper v. Bristow* (f).

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was a rule for cancelling a warrant of attorney, and setting aside the judgment signed thereon, and all subsequent proceedings: and one ground relied on was a defect in the attestation, for want of a proper appointment of the attesting attorney.

It appears on the plaintiff's affidavit, that the defendant stood indebted to him on an over due bill, and other accounts, on August 24th, 1846, when he was applied to

(a) 8 Dowl. 242; S. C. 6 M. & W. 91.

(b) 8 Dowl. 599.

(c) Ibid. 626.

(d) 3 Taunt. 235, 236.

(e) 7 Dowl. 747.

(f) 6 M. & W. 807; S. C. 8 Dowl. 797.

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on his behalf by one Rishworth, who urged him to advance the defendant a larger sum, amounting with the monies due or to become due, to 400*l*., for which the defendant should give fresh bills, and also his warrant of attorney; and this, he says, he consented to do. That on the 25th, the defendant called, and pressing him to consent to the advance (though it should seem he had already consented to make it) agreed that the warrant should be made payable in three months, without reference to the time the bills would have to run, and that the money secured on it should be paid, whether the bills were due and payable or not, and whether in the plaintiff's possession or not, at the time—and that the bills should be made payable at three, four, and six months. By the desire of the plaintiff, it is there stated, that the defendant repaired to Mr. Dyte, the plaintiff's attorney, to give him instructions for preparing the warrant; and Mr. Dyte swears, that upon his putting the questions to him, the defendant stated there had been bill transactions between the plaintiff and himself, but it was unnecessary to mention them in the warrant, for that the sum of 400*l*. was the agreed balance on a settlement of all accounts to that day. Mr. Dyte then swears that he told him that he must be prepared with a solicitor to act on his behalf at the execution, to which the defendant answered that he was aware of the necessity, but as he did not wish his own solicitor to be cognizant of the transaction, he (as it stands in the original the "deponent," which would mean Dyte, but I conceive by mistake for "defendant"), would procure a solicitor in the neighbourhood on his coming to the deponent's office to execute the warrant. The warrant was accordingly prepared according to his instructions, and nothing was said, in the defeasance, of the bills, nor any provision made for their being given up on satisfaction of the warrant of attorney. On the following day, the 26th, the defendant came to the office with Rishworth, but without any attorney, and requested Dyte to send for one, and he accordingly sent for a Mr. Burgess,

who was certainly an entire stranger to the defendant, and appears to have been equally so to the transactions between the plaintiff and the defendant. Dyte's affidavit is very short and general as to what passed between Burgess and the defendant. Burgess states, that the defendant told him he had sent for him as his attorney to attest the execution of a warrant of attorney, which he pointed to as lying on the table; that he sate down and read it, and desired the defendant to write his nomination as his attorney, in the blank left for that purpose in the body; but the defendant begged him, as he sate at the table, with a pen in his hand, to do it, which he did. That he was proceeding to explain the instrument to him, when he was interrupted by the defendant with an assurance that he was perfectly aware of its nature and meaning, that however he persisted in doing so minutely, and at the close was assured by the defendant that he perfectly understood it,—that it was quite correct; on which the execution proceeded at once. The defendant paid him a guinea, and he left the room.

Upon this state of facts, on which, though it differs in some important particulars from the defendant's statement, I must decide this part of the rule, I am clearly of opinion that the requisitions of the statute, so far as regards the nomination of the attorney, have been complied with. In the number of cases which have been decided on this point, the Court have been pressed with a desire on the one hand to give the statute a strict construction, in order to ensure to defendants all the protection which it was the intention of the Legislature to afford them; and on the other, not to be so extreme, and literal, as to assist in committing frauds on plaintiffs, which, by means of objections on the statute, are too often attempted.

It is not to be wondered at, therefore, that the decisions are not all strictly uniform; but numerous authorities, and those the later, as well as the reason of the thing, shew that neither of the only two objections, which are made in this case, ought to prevail.

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First, the attorney, it is said, was a stranger to the defendant, suggested to him by the plaintiff's attorney; suggested alone, so that the defendant had no opportunity of selecting and exercising a free choice. The statute only requires that he should be "expressly named." The same circumstance existed in *Taylor v. Nicholl* (a); *Hale v. Dale* (b); *Pease v. Wells* (c); and in the second of these cases, my late Brother *Williams* laid down the rule, as it seems to me, correctly and clearly, (as his manner was), "that if an attorney is presented by the plaintiff's attorney to the defendant, and he freely chooses him, for the specific purpose of advising him with respect to the warrant of attorney, that amounts to a nomination of an attorney by him within the provisions of the statute." It is true that in one of these cases the defendant went to the attorney's office—in another, he and the attorney retired into a private room, and these facts shew that a fuller and more confidential communication might in those cases have taken place than did in fact take place in the present; but these things come after the nomination, as to which the only question is, had the defendant an opportunity of exercising a free choice, and did he in fact do so? It appears to me that he was a free agent, and freely adopted the suggestion made to him, and made to him at his own request. Had he so pleased he might have brought his own family solicitor; for his own convenience he does not do that, and he must not turn a difficulty or disadvantage of his own creation into an occasion of fraud on the plaintiff.

Secondly it is urged, that Burgess, being a stranger, was not able to give, nor did he in fact give to the defendant the protection which the statute intended to secure, and this is true. According to the statement, the bargain, into which the plaintiff proposed to enter, was a most improvident one; one which an attorney knowing it, would have been bound

✓ (a) 8 Dowl. 242.

✓ (b) Ibid. 599.

✓ (c) 8 Dowl. 626.

to advise him from completing. But it was the defendant's own fault that Burgess was ignorant of these circumstances: there is no doubt that at the time of execution he was desirous of securing the advance of money, and not willing to raise delay and difficulty; and he cannot now complain that his interests were not protected, if he withheld from his adviser the necessary information.

I think, therefore, that the objections founded on the statute fail; but the transactions altogether appear to me open to so much suspicion, capable, however, it may be of complete explanation, that it is fit they should be inquired into. Let it therefore be referred to the Master to ascertain what is due to the plaintiff, and upon the payment of that sum, and the costs of the proceedings, let the bills of exchange be delivered up to the defendant, and satisfaction be entered on the judgment. The warrant of attorney, and the judgment in the meantime to stand as security, and the proceedings to be stayed, and let the costs of this rule be in the discretion of the Master.

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Rule accordingly.

DOE *d.* HAXBY *v.* PRESTON and Another.

A RULE had been obtained in Michaelmas Term, 1846, calling upon the lessor of the plaintiff to shew cause why the postea in the above action should not be made conformable to the award of the arbitrator (*a*).

(*a*) The rule also asked to have certain costs set off; but nothing turned upon that part of the rule.

arbitrator awarded that the lessor of the plaintiff was entitled to recover "three certain pasture gates." The lessor of the plaintiff entered up the verdict for "three certain pasture gates, sometimes known as pasture gates, sometimes as cattle gates." *Held*, that it was not competent to the lessor of the plaintiff to make such an alteration; although it was sworn, on the part of the lessor, that the names "pasture gate," and "cattle gate," were indiscriminately used for the same thing.

A declaration in ejectment contained two demises in two counts, in each, one "pasture gate," and one "cattle gate," were sought to be recovered. The cause having been referred, the

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Addison shewed cause.

Rew, in support of the rule.

The facts and arguments appear sufficiently from the judgment.

COLERIDGE, J., now delivered judgment (*a*).—In this case the facts are shortly these: the declaration contains two demises in two counts; under each, “one pasture gate” and “one cattle gate” are sought to be recovered. The cause having been referred, the arbitrator has awarded that the lessor of the plaintiff is entitled to recover “three certain pasture gates;” the lessor of the plaintiff, in making up the *postea*, desirous of losing no part of that which is awarded, but afraid of an apparent variance between the declaration and the *postea*, has framed it thus, “three certain ‘pasture’ gates, sometimes known as ‘pasture’ gates, sometimes as ‘cattle’ gates.” In answer to the rule he has filed affidavits, shewing that the names “pasture gate,” and “cattle gate,” are indiscriminately used for the same thing.

I am of opinion that this rule must be made absolute. Nothing was stated in the argument, or on the affidavits, to shew that the relation in this case between the award and the *postea*, was other than that between the verdict, as pronounced by the jury, and the *postea*, in a cause which takes its ordinary course. In such case the *postea* is as to this part, the orderly expression on the record of the finding of the jury. The parties can add nothing to it by the direction of the Judge who tries the cause. Its language may be modified so as to make it more truly represent what is taken to be the true effect of that finding. The Court, however, refuses to do even that, because it has not the requisite knowledge; it sends the party to the Judge when

(*a*) That part of the judgment which related to the setting off the costs is omitted for the reason before mentioned.

any such modification is needed after the record is made up. The party, however, can never make any addition; whether material or immaterial makes no difference; he is not to be suffered to exercise his discretion as to this on account of the consequences. If the addition now made be material, it adds something to the award; it gives the lessor of the plaintiff something, which it may be, the arbitrator never intended to award to him; if, in truth, "cattle" gate and "pasture" gate mean the same thing, *ex vi terminorum*, or that the Court can judicially take notice that the *postea* and the award correspond with the declaration, or at least are within it, the addition made is unnecessary; but it still affirms something expressly which the arbitrator has not found expressly.

There seems to be no objection to the lessor of the plaintiff taking less by the *postea* than the award has given him. The rule must be absolute.

Rule absolute.

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(HOLY TRINITY, LONDON, v. ST. JAMES, CLERKENWELL).

THIS was a rule calling upon the keepers of the peace and justices in and for the county of Middlesex to shew cause why a writ of mandamus should not issue directed to them, commanding them to enter continuances and hear an appeal of the churchwardens and overseers of the poor of the parish of the Holy Trinity, in the city of London, against an order under the hands and seals of Charles Salisbury

An appeal against an order for payment of maintenance and expenses of a lunatic pauper, under 8 & 9 Vict. c. 126, s. 62, which recites an order adjudicating the settlement

of the pauper, is an appeal also against the settlement.

The 8 & 9 Vict. c. 126, s. 62, incorporates so much of the 4 & 5 Wm. 4, c. 76, s. 79, as is applicable to the case of an appeal against an order adjudicating the settlement of a lunatic pauper. A copy of the examinations must therefore be sent to the parish on whom an order for maintenance, &c., of a lunatic pauper, reciting an adjudication of the settlement, is made.

Seem, that in the case of a lunatic pauper, a notice of chargeability under 4 & 5 Wm. 4, c. 76, s. 79, need not be sent.

12, 28: 126. 294.
15 — — 1030.

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Butler and Edward Stock, Esqs., two of the said keepers of the peace and justices, bearing date the 29th day of Nov., 1845, whereby the treasurer of the guardians of the poor of the city of London Union was ordered to pay to the churchwardens and overseers of the poor of the parish of St. James, Clerkenwell, in the said county of Middlesex, the sum of 15*s.* 6*d.*, being the expenses incurred on behalf of the said parish of St. James, Clerkenwell, in the said county, in and about the examination of Sarah Grimes, a pauper lunatic, and her conveyance to a house duly licensed for the reception of insane paupers at Bow, in the said county; and also to pay weekly and every week to the proprietors of the said licensed house from the 1st day of Dec., 1845, for and during so long time as the said lunatic should be confined in the said licensed house under the order therein mentioned, the sum of 11*s.*, for the charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic as aforesaid.

It appeared from the affidavits, that upon the 3rd of December, 1845, the following copy of an order was served upon the clerk of the treasurer of the guardians of the poor of the city of London Union, at the office of the city of London Union :—

Middlesex } To the treasurer of the guardians of the poor
 to wit. } of the city of London Union in the city of
 London.

Whereas by a certain order under the hands and seals of us, Charles Salisbury Butler, and Edward Stock, Esqrs., two of her Majesty's justices of the peace in and for the county of Middlesex, in which the parish of St. James's, Clerkenwell, hereinafter mentioned, is situate, bearing even date herewith, directed to the churchwardens and overseers of the poor of the parish of St. James's, Clerkenwell, aforesaid, reciting that by a certain order under the hand of Boyce Combe, Esq., one of her Majesty's justices of the peace in and for the county of Middlesex, in which the said

parish is situate, bearing date the 24th day of November, 1845, directed to Edward Byas, the proprietor of the house duly licensed for the reception of insane paupers, and called or known as Grove Hall, situate at Bow, in the said county, reciting that the said justice having called to his assistance a surgeon, and having personally examined Sarah Grimes, a pauper of the parish of St. James's, Clerkenwell, in the said county of Middlesex, and being satisfied that the said Sarah Grimes was a lunatic and of unsound mind, and a proper person to be confined, the said justice (the pauper lunatic asylum established in and for the said county of Middlesex being full) thereby directed the said Edward Byas to receive the said Sarah Grimes as a patient into his said licensed house, to which order a statement was subjoined, according to the form of the statute in such case made and provided. And it is in and by the said herein first mentioned order further recited, that the churchwardens and overseers of the poor of the said parish of St. James's, Clerkenwell, had made application to us, the said Charles Salisbury Butler and Edward Stock, Esqrs., the said first named justices, to inquire into the last legal settlement of the said Sarah Grimes, so ordered to be confined in the said licensed house as aforesaid, and that thereupon we, the said Charles Salisbury Butler and Edward Stock, Esqrs., having found that the said Sarah Grimes was then confined in the said licensed house in pursuance of the said herein last mentioned order, bearing date the 24th day of Nov. aforesaid, did proceed to inquire into her last legal settlement accordingly, and satisfactory evidence having been then adduced before us, as well upon oath as otherwise, that the last legal settlement of the said Sarah Grimes was in the parish of Holy Trinity, in the city of London Union, in the city of London; we, the said Charles Salisbury Butler and Edward Stock, Esqrs., did by the said herein first mentioned order under our hands and seals adjudge the last legal settlement of the said Sarah Grimes to be in the said parish of Holy Trinity within the said union accordingly. And whereas it appears unto us, Charles Salisbury

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Butler and Edward Stock, Esqrs., two of her Majesty's justices of the peace in and for the said county of Middlesex, as well upon oath as otherwise, that the said lunatic, Sarah Grimes, in and by the said order of us, the said Charles Salisbury Butler and Edward Stock, Esqrs., was and is adjudged to be settled in a parish, to wit, the parish of Holy Trinity, in the city of London Union, and city of London, different from the parish, to wit, the parish of St. James's, Clerkenwell, in the county of Middlesex, from which she was sent to such licensed house as aforesaid. And whereas it is now duly proved unto us, the said Charles Salisbury Butler and Edward Stock, Esqrs., as well upon the oath of James Bennet as otherwise, that the expenses incurred by and on behalf of the said parish of St. James's, Clerkenwell, in and about the examination of such lunatic, and her conveyance to the said licensed house, amount to 15s. 6d.

We, therefore, the said Charles Salisbury Butler and Edward Stock, Esqrs., do hereby order you the said treasurer of the said guardians of the poor of the city of London Union aforesaid, to pay to the said churchwardens and overseers of the said parish of St. James's, Clerkenwell, the said sum of 15s. 6d., being the expenses incurred by and on behalf of the said parish of St. James's, Clerkenwell, in and about the said examination and conveyance as aforesaid of the said lunatic. And we do also further order you, the treasurer of the said guardians of the poor of the city of London aforesaid, to pay weekly and every week to the said Edward Byas, the proprietor of the said licensed house, from the 1st day of December, 1845, for and during so long time as the said lunatic shall be confined in the said licensed house, under the said order as aforesaid, the sum of 11s., the same being duly proved to us upon oath to be the reasonable charges of the future lodging, maintenance, medicine, and care of such lunatic as aforesaid.

Given under our hands and seals, &c.

(Signed, &c.)

CHARLES S. BUTLER, (L. s.)

EDWARD STOCK, (L. s.)

That the said order being unaccompanied by any examinations, application was made by the relieving officer of the city of London Union to the parish sending the order for a copy of the examinations, which was refused, except upon the payment of a fee of one guinea. That, on the 23rd of December, that fee was paid, and a copy of the examinations accordingly then obtained. It appeared that the parish officers of the parish of the Holy Trinity did not receive notice, or know of the order having been obtained, until after Christmas, 1845. That the Epiphany Quarter Sessions for 1846, in and for the county of Middlesex, were held on the 6th of January. That a notice and grounds of appeal for the April Quarter Sessions were given, by the churchwardens and overseers of the parish of the Holy Trinity, upon the 9th of February, 1846. That at the April Quarter Sessions, the appeal was entered and respited, and came on for trial at the July Quarter Sessions, which were held on the 10th of July. And that, on the appeal being called on, it was objected by the respondent parish that it was not in time, and the sessions being of that opinion refused to hear it.

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Bodkin (with whom was *Boothby*) now shewed cause. The question in this case is, whether it is necessary that a parish obtaining an order of this kind should send a copy of the examinations on which such order has been made, in pursuance of the 4 & 5 Wm. 4, c. 76; because, if not, it may be taken as conceded that the appeal in this case was clearly out of time, and the sessions justified in refusing to hear it. It is submitted that it is not necessary that they should do so. First, this cannot be considered as an order adjudicating the settlement. It merely recites such an order having been made, and is itself simply an order for the payment of money. All that the parish appealing against this order could go into at the trial would be objections to this order for payment of the money, not objections to the previous recited order adjudicating the settlement.

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If, then, this is to be considered as simply an order for payment of money, it cannot be contended that it is necessary to send with it a copy of the examinations. But even should the Court hold that it is in fact to be considered also as an order adjudicating the settlement, so far as to entitle the parish upon whom it is made to dispute the settlement upon appeal against the order, it is submitted that, even in that view, it was not necessary to send a copy of the examinations, and that the stat. 4 & 5 Wm. 4, c. 76, s. 79, does not apply. This order is made under the 8 & 9 Vict. c. 126, s. 62. By sect. 58 (a) of that act, any two justices of the county or borough in which the lunatic asylum is situated, are empowered to inquire into the place of settlement of any pauper lunatic confined therein, and to adjudicate the same. And by sect. 62 (b) it is enacted, that if the

(a) 8 & 9 Vict. c. 126, s. 58.
 "That it shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house is situate, or to which such asylum shall wholly or in part belong, or from any part of which any pauper lunatic shall have been sent, at any time to inquire into the last legal settlement of any pauper lunatic confined or ordered to be confined therein; and if satisfactory evidence can be obtained as to such settlement in any parish, township, or place, such justices shall, by order under their hands and seals, adjudge such settlement accordingly."

(b) Sect. 62. "That if, after any lunatic shall have been sent to an asylum, registered hospital, or licensed house, it shall be adjudged that such lunatic is settled in a parish different from the parish from which, or at the instance of some clergyman or

officer of which, he was sent to such asylum, hospital, or house, then and in such case it shall be lawful for any two justices of the county from any part of which any lunatic shall have been sent, or for any two justices, members of the committee of visitors of such asylum, to make an order or orders upon the treasurer of the guardians of the union, including any parish, or of any parish, or the overseers of the parish in which the lunatic shall be so adjudged to be settled, for payment to the treasurer of the guardians or overseers of the first-mentioned union or parish of all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and his conveyance to the asylum, hospital, or house, and of all monies paid by the treasurer of the guardians, or the overseers of such first-mentioned union or parish, to the treasurer, officer,

lunatic be adjudged to belong to some other parish than that in which the lunatic asylum is situated, two justices of the county may make an order upon the treasurer of the guardians of the union, including any parish, or of any parish, or the overseers of the parish in which the lunatic shall be so adjudged to be settled, for the payment of the expenses and for his maintenance: " provided always, that the guardians of any union or parish, or the overseers of any parish, township, or place, affected by such order, may appeal against the same in like manner as if the same were a warrant of removal; and in case of such appeal the guardians of the union or parish, or the overseers of the parish, township, or place, or the clerk of the peace of the county to which such lunatic was chargeable before such order was made, may defend such appeal, and the persons appealing

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or proprietor of the asylum, registered hospital, or licensed house for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and also for payment to the treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house, of the reasonable charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic; and every treasurer of the guardians or overseers on whom any such last-mentioned order shall be made shall, out of any money which may come into his hands by virtue of his office, immediately pay to the treasurer of the guardians or overseers of such first-mentioned union or parish, the amount of the expenses and monies by such order directed to be paid to him or them, and from time to time pay to the said

treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house, the future charges aforesaid: Provided always, that the guardians of any union or parish, or the overseers of any parish, township, or place, affected by such order, may appeal against the same in like manner as if the same were a warrant of removal; and in case of such appeal the guardians of the union or parish, or the overseers of the parish, township, or place, or the clerk of the peace of the county to which such lunatic was chargeable before such order was made, may defend such appeal, and the persons appealing or intending to appeal, and the persons defending such appeal, shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects as the case of an appeal against a warrant of removal."

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or intending to appeal, and the persons defending such appeal, shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects as in the case of an appeal against a warrant of removal." This section means that the appeal shall be proceeded with in the same manner as an appeal against a warrant of removal; but it does not say that the preliminary steps, that is, the grounds on which an appeal arises, shall be subject to the same restrictions and formalities as in cases of warrants of removal. And, indeed, the object of sending the examinations, which is to prevent useless removals when parties may have some good objection to the order, does not exist in a case like the present where no actual removal ever takes place. A clause very similar to the present, in the former statute, on this subject, the 9 Geo. 4, c. 40, s. 54, which requires the quarter sessions to hear and determine an appeal under that act "in the same manner as appeals against orders of removal are now heard and determined," is now under the consideration of this Court, in a case of *Reg. v. The Justices of the West Riding*; and Mr. Justice Williams, in granting the rule for the mandamus in that case, expressed a strong opinion that the 4 & 5 Wm. 4, c. 76, s. 79, did not apply (a). In *Reg. v. The Recorder of*

(a) The rule was moved for in the Bail Court, and his Lordship, after taking time to consider, in Hilary Vacation, 1846, delivered the following judgment.

REGINA v. The Justices of the WEST RIDING.

10 2/3 - 772.

THIS was an application for a mandamus to the justices of the West Riding of Yorkshire, to direct them to enter continuances and hear an appeal against a certain order made by two justices of the West Riding, whereby, after directing the overseers of a certain township to remove a lunatic pauper to the asylum for that riding, the same justices proceeded to inquire into the settlement of the pauper, and determined it to be in the parish of Liverpool. And the order then proceeded to direct a certain sum of money to be paid weekly for the maintenance and expenses of that pauper in the lunatic asylum. Against this order there was an appeal, and the question is, whether or not that appeal was in time.

York (a), which was an appeal under the same statute, the Court held that it was not necessary that grounds of appeal

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The order was made on the 8th of March, the service was on the 13th of March, the next sessions for the West Riding were held upon the 7th of April, and the notice of appeal was given on the 13th of June for the July sessions. In consequence, if the appeal be entirely under the act authorizing the removal of paupers to lunatic asylums, (9 Geo. 4, c. 40), there being an express provision in the 54th section of that act, that appeals under it "shall be heard and determined in the same manner as appeals against orders of removal are now heard and determined"—if upon that statute alone, I say, the appeal depends upon the present occasion, the appellants were too late within the 9 Geo. 1, c. 7, and the justices were right in refusing to hear the appeal. But a question arises which has not arisen before, or at least has not been decided by the Court, how far the 54th section of the 9 Geo. 4, c. 40, directing the appeal to be heard and determined in the same manner as in cases of orders of removal, is affected by the Poor Law Amendment Act, 4 & 5 Wm. 4, c. 76, and especially by the 79th section of that act; because, if there was a virtual extension of the time for appealing by that 79th section, the appellants would have been in time by appealing to the July sessions; though they were not in time, if the appeal was regulated and directed by the 9 Geo. 1, c. 7, s. 8.

The meaning of the case of *Regina v. The Justices of Lancashire*, (4 Q. B. 910), is this, that whereas in the case of orders of removal under 4 & 5 Wm. 4, parties cannot be removed, (unless in certain cases, to which I shall immediately advert), until twenty-one days after notice in writing has been given to the parish to which the removal is to be made, that is virtually an extension of the time of appealing, seeing, that, if the appellant township take nineteen or twenty days to consider of it, they then have the ordinary time to give their notice of appeal, plus those nineteen or twenty days. And if the construction of the 79th section of the latter act does produce that effect upon the present occasion, the appeal was in time, and the justices were wrong in rejecting the appeal; otherwise, if that section does not apply, and there be not a virtual extension of the time; (for a direct extension there certainly is not, the 4 & 5 Wm. 4, c. 76, containing no provision at all altering the time for appeal, and it is done virtually, and incidentally, (if I may so express it) if done at all.)

Now the language of the 79th section, on which it all depends, (because although the question may be one of some doubt, it lies within the narrowest compass) the 79th section is in these terms :
"No poor person shall be removed or removable under any order of
✓ (a) *Ante*, vol. 4, p. 376.

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should be given. [*Wightman*, J.—It was not argued in that case that the 4 & 5 Wm. 4, c. 76, s. 79, applied at all. The contention there was, whether the appeal was under the 46th and 54th sections of the 9 Geo. 4, c. 40, or under the 60th section of that statute, in which latter case the words of the section directed notice of “the nature and matter” of the appeal to be given; and I was of opinion that it was under one of the former sections, and therefore that sec. 60 did not apply. I do not think there is anything in this objection.]

Pashley, in support of the rule. It may be conceded that if under the appeal against this order, the appellants could not go into the question of settlement, it would not

removal from any parish or workhouse,” (that means any place whatever maintaining its own poor; because “parish” by the interpretation clause, sect. 109, means all places that maintain their own poor, and therefore the language in ordinary understanding must mean in a workhouse or in a parish, or other place maintaining its own poor); such poor person is not to be removable “by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, and by a copy of the examination upon which such order was made, shall have been sent by post or otherwise, to the parties.” When I come to attend to the language of that section, it seems to me that it is utterly inapplicable to the present case. This is not a case by possibility of removal from any parish or township at all; the pauper was in a lunatic asylum, (that is the very foundation of the order on the parish of Liverpool), and, consequently, was irremovable at the time, and these provisions are wholly inapplicable. This is my present impression; but the case is new, and has not been decided; and I do not think it fit that a single Judge should determine this question, and, therefore, against that impression I intend to act; if the parties are not satisfied with this, which I will not call an opinion, but an impression, and that after some consideration of the construction of the act of Parliament, as there is no other mode of raising the question but by ordering the mandamus to go, by means of which the question may be raised upon the return, which will cause the whole case to be considered by the full Court, I shall do so.

I shall, therefore, make the rule absolute, though against my present impression.

Rule absolute.

be necessary that a copy of the examinations should be sent with the order, under the 4 & 5 Wm. 4, c. 76, s. 79; but here the appeal, it is submitted, does include an appeal against the settlement. This is evidently the intention of the Legislature, as the 58th section which authorizes the justices to adjudicate on the settlement of a lunatic pauper, contains no power of appeal; and the terms of the 62nd sect., which gives the appeal against the order of maintenance, obviously contemplate its operating as an appeal also against the settlement; otherwise, the assimilation of the proceedings to those on an appeal against an order of removal, would seem without any particular significance or propriety. An order adjudicating the settlement of a pauper lunatic under the 58th section is an *ex parte* proceeding. The 80th section excludes it from the category of orders against which that section gives a general power of appeal; and it could never be the intention of the Legislature that it should be binding on parties who have had no opportunity of being heard against it. A power of appeal against an order, founded upon and reciting such an order would, therefore, include an appeal against the *recited settlement* itself. Assuming that to be so, it is submitted that the provisions of 4 & 5 Wm. 4, c. 76, s. 79, apply to an order like the present, and that a copy of the examinations ought, therefore, to have been sent. The 8 & 9 Vict. c. 126, s. 62, says, "that the guardians of any union or parish, or the overseers of any parish, township, or place, affected by such order, may appeal against the same in like manner as if the same were a warrant of removal; and in case of such appeal the guardians of the union or parish, or the overseers of the parish, township, or place, or the clerk of the peace for the county to which such lunatic was chargeable before such order was made, may defend such appeal, and the persons appealing or intending to appeal, and the persons defending such appeal, shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects as in the case of an appeal

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against a warrant of removal." The respondents, therefore, are to have all the powers, rights, and privileges, and to be subject to all the obligations attached to respondents in case of an appeal against a warrant of removal. What, then, are the obligations which attach to respondents in an appeal against a warrant of removal? One certainly is, that they should have sent a copy of the examinations, together with the order of removal, in pursuance of the 4 & 5 Wm. 4, c. 76, s. 79. This is as much an *obligation* on the respondents as it is their *right* to have grounds of appeal delivered with the notice of appeal. The question that is now pending in the full Court in *Reg. v. Justices of West Riding*, is quite a different question. There it turns upon a different statute, 9 Geo. 4, c. 40, s. 54, which requires the quarter sessions to hear and determine an appeal under that act "in the same manner as appeals against orders of removal are *now* heard and determined;" and one question will be, whether the word "*now*" can have a prospective operation, and include the requisitions of the subsequent statute, 4 & 5 Wm. 4, c. 76, s. 79. The case of *Reg. v. The Recorder of York (a)* does not apply, for the reasons assigned by the Court.

Cur. adv. vult.

WIGHTMAN, J., (after referring to the case of *Reg. v. Justices of West Riding*, in which judgment had, the same morning, been delivered in the full Court).—I am of opinion that an appeal against an order for payment of maintenance and expenses of a lunatic pauper, under the stat. 8 & 9 Vict. c. 126, s. 62, which recites a previous order of justices adjudicating the settlement of the lunatic pauper to be in the parish upon whom the order for payment of maintenance and expenses is made, is in effect an appeal also against the adjudication of the settlement. The question then arises, whether it is necessary that a copy of the examinations

✓ (a) *Ante*, vol. 4, p. 376.

upon which the adjudication of settlement proceeds, should be forwarded with the copy of the order to the parish on whom it is made, in compliance with the 4 & 5 Wm. 4, c. 76, s. 79; and I am of opinion that it ought to be. I think that so much of the 4 & 5 Wm. 4, c. 76, s. 79, is incorporated in the 8 & 9 Vict. c. 126, s. 62, as is applicable to the case of an order adjudicating the settlement of a lunatic pauper. It may be a question how far it is necessary to give a twenty-one days' notice of chargeability, because there is no removal of a lunatic pauper, and therefore the reason of that enactment fails; but I am of opinion that so much of the requisitions of the 4 & 5 Wm. 4, c. 76, s. 79, as are applicable, reddendo singula singulis, are incorporated in the 8 & 9 Vict. c. 126, s. 62, and that, therefore, a copy of the examinations ought to have been sent. The rule, therefore, must be absolute.

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Rule absolute.

PARKER v. GILL.

(In the full Court).

INDEBITATUS assumpsit for work and labour, care, diligence, journees, and attendances, done, performed, and bestowed, and for materials therein found and provided by the plaintiff as an attorney and solicitor of and for the defendant, and on his retainer, in and about the prosecuting, defending, and soliciting of divers causes and suits, and in and about other business of the defendant at his request,

To an action on an attorney's bill, the defendant pleaded that the plaintiff did not deliver "one month" before bringing the action a signed bill of his fees, "pursuant to the statute in

such case made," "contrary to the form of the said statute." The 6 & 7 Vict. c. 73, s. 37, requires a bill to be delivered "one month" before bringing an action, and by the interpretation clause, "month" is declared to mean "calendar month." Held, on special demurrer, that the word "month" in the plea was to be taken to mean "lunar month;" that the words "pursuant to the statute," &c. would not enable the Court to construe it as a "calendar" month; and that as the act required a delivery a "calendar month" before the action, the plea was bad as tendering an inconclusive and immaterial issue. See 1. Park. R. 359.

Quare, if the plea was not also bad as being an argumentative averment that the plaintiff did not deliver one "calendar" month before bringing the action, a signed bill, &c.

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and for certain fees due and of right payable in respect thereof; and for money paid, laid out, and expended by the plaintiff for the defendant at his request: and in 100*l*. for money found to be due from the defendant to the plaintiff on an account then stated between them.

Plea. That this action was commenced after the 22nd day of August in the year of our Lord 1843, to wit, on the 13th day of June in the year of our Lord 1846, and that the same, so far as relates to the causes of action in the said first count mentioned, is prosecuted and maintained by the plaintiff against the defendant for the recovery of certain fees, charges, and disbursements by the plaintiff claimed to be due to him from the defendant for and in respect of certain business theretofore done by the plaintiff as an attorney and solicitor for the defendant, as in the said first count particularly mentioned. And the defendant further saith, that the plaintiff did not, at any time one month or more before the commencement of this suit, deliver unto the defendant (he being the party to be charged therewith), or send by the post to, or leave for him at his counting-house, office of business, dwelling-house, or last known place of abode, or at any or either of such places, a bill of such fees, charges, and disbursements, subscribed with the proper hand of the plaintiff, so being the person claiming to be entitled to the said fees, charges, and disbursements as aforesaid, or enclosed in or accompanied by a letter subscribed in like manner referring to such bill, pursuant to the statute in such case made, but therein wholly failed and made default, contrary to the form of the said statute.

The following were marked as the plaintiff's points of argument. That the plea does not allege that the plaintiff did not, one calendar month before the commencement of this suit, deliver, send, or leave, to or for the defendant, as mentioned in that plea, such a bill as mentioned in that plea. That the averment in the plea that the plaintiff did not, at any time one month or more before the commencement of this suit, deliver, send, or leave, as

mentioned in that plea, such a bill as therein mentioned, is a vague and improper averment, upon which no material, proper, or sufficiently certain issue can be taken. That it does not appear from the plea that the defendant was not an attorney, or that the plaintiff was not authorized to commence the action by a Judge of the superior Courts of law or equity. And that it does not sufficiently appear that the money in the first count alleged to have been paid was paid in fees or disbursements in and about the doing the business.

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Phipson, in support of the plea (a). This plea is demurred to because it does not state that no signed bill was delivered one *calendar* month before the commencement of the action. It seems a singular cause of demurrer for a plaintiff to insist on, that the defendant has circumscribed his own rights, and that he has not pleaded his defence so largely as he might have done. It is submitted that this is no good ground of demurrer, for even supposing that the word "month" here is to be read as "lunar month," if the plaintiff did not deliver a signed bill one lunar month before commencing his action, *à fortiori* he could not have delivered it one calendar month. There is no difficulty in the plaintiff's taking issue upon this plea, for if found for the defendant it is conclusive against him, and if found in his favour, although it might appear that a bill was in point of fact delivered only twenty-nine days before the commencement of the action, the defendant could take no advantage of it, having chosen to rely on a defence less in degree than he was entitled to have pleaded. But it is submitted that the word "month" here must be taken to mean "calendar month." The case of *Lang v. Gale* (b) shews, that the word month may mean calendar or lunar, according to the intention of the parties; and *Hart v. Middleton* (c) shews,

(a) The counsel in support of the demurrer were momentarily absent when the case was called on.

(b) 1 M. & Sel. 111.

(c) 2 Carr. & K. 9.

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that in commercial matters it means "calendar." Here the defendant has followed the exact words of the section, 6 & 7 Vict. c. 73, s. 37, which are "one month." And it is only by reference to the interpretation clause, sect. 48, that it is enacted, that where the word "month" is used in the act, "calendar month" is to be understood. Now the defendant pleads, that the plaintiff did not, "at any time one month or more before the commencement of this suit, deliver," &c., "a signed bill," &c., "pursuant to the statute in such case made," &c., "contrary to the form of the said statute." Here, therefore, there is a direct reference to the statute for the meaning of the word "month," and on looking to the statute, it is found that it means "calendar month." [*Coleridge, J.*—Suppose the act had said, in the 37th section, "calendar month," would you have contended that it was sufficient to say in the plea "month" simply?] Yes; the words "pursuant to the statute" would have shewn what description of month was meant. [*Coleridge, J.*—You contend, that if the plea said twenty-eight days it would be sufficient, as the plaintiff might have securely taken issue on it.] It is submitted that that would be sufficient. [*Patteson, J.*—Suppose the plea had said that the plaintiff delivered no signed bill at all "pursuant to the statute." *Coleridge, J.*—You would say the plaintiff could have no difficulty in taking issue on it.] Yes; the defendant could not take any advantage. [*Patteson, J.*—If the plaintiff had traversed "pursuant to the statute," and it turned out that the bill had been delivered only twenty-nine days before the commencement of the action, would the plaintiff have failed in proof of the issue?] It is submitted that he would, which is a test that a sufficient issue has been tendered.

Lowndes (with whom was *Peacock*), in support of the demurrer. It is submitted first, that the word "month," in pleading, is to be taken to mean "lunar" and not "calendar

month" (a); secondly, that it cannot be taken to mean "calendar" by reference to the statute, inasmuch as the intention and terms of the interpretation clause apply only to the act itself; and thirdly, that if the word "month" be taken to mean "lunar" month, the plea is bad. [He was desired by the Court to confine himself to the last point.] The plea is bad, first as being an argumentative averment that the plaintiff did not deliver one calendar month before bringing the action; and secondly, as tendering an inconclusive and immaterial issue. As to the first ground, that it is an argumentative averment, the rule is very clearly laid down in all the books, that "pleadings must not be argumentative: in other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only;" *Steph. on Plead.* p. 411-12, 4th ed. So in 1 *Chit. on Plead.* p. 539, (6th ed.), it is said, "a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, reasoning, or argument;" and *Co. Litt.* 303 (a), 304 (a); *Com. Dig.* tit. "Plead." E. 3, are cited, and various other authorities. Amongst the instances given in *Steph. on Pleading*, p. 412-13, (4th ed.), in support of the rule above laid down, is that of a plea to an action of trespass for taking and carrying away the plaintiff's goods, "that the plaintiff never had any goods;" upon which the Court remarked, "this is an infallible *argument* that the plaintiff is not guilty, and yet it is no plea:" and he cites *Doct. Pl.* 41; *Dyer*, 43 a. So also in an ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, then steward of the manor. The plaintiff traversed that Foster was steward, and all the Court held this

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(a) See as to this point, *Catesby's case*, 6 Rep. 62; *Com. Dig.* tit. "Ann." (B). Per Cur. in *Barksdale v. Morgan*, 4 Mod. 185; judgment of Lord Kenyon and Mr. Justice Grcse, in *Lacon v. Hooper*, 6 T. R.

226, 227; *Lang v. Gale*, 1 M. & S. 111; per Parke, J., in *Crook v. McTavish*, 1 Bing. 167; S. C. 8 Moore, 265; *Soper v. Curtis*, 2 Dowl. 237. ✓

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to be no issue, and that the traverse ought to have been that he did not surrender; *Wood v. Butts* (a): and Mr. Serjt. *Stephen* remarks, that the reason of this decision appears to be, that the traverse was "an argumentative denial of the surrender;" *Steph. on Plead.* 413, (4th ed.) (b). As to the second ground, the plea is bad as tendering an inconclusive and immaterial issue. The plaintiff is not to be called upon to join issue upon a fact which, although argumentatively conclusive if found in favour of the defendant, would not, if found in favour of the plaintiff, shew that he had complied with the requisitions of the statute. The defence intended to be set up by this plea is, that the plaintiff has not fulfilled the requirements of the statute by delivering, one calendar month before action brought, a signed bill, &c., to the defendant. Why should he be compelled to take issue upon a plea, which, if found one way, might shew that he had not complied with the terms of the statute, but if found the other, would not shew that he had? It may be said that he would not suffer by that fact, as the issue would still be found for him, which would determine the action in his favour. But the Court will not compel a party to join in an issue which they see is really not the issue intended to be raised, where the objection, as here, arises on special demurrer. The time of the Court ought not to be occupied in trying an issue, which, resting the defence on the non-compliance on the part of the plaintiff with the requisitions of a statute, may, if found against him, shew that he has not fulfilled its terms, but, if found for him, cannot shew that he has. The case of *Burroughs v. Hodgson* (c) is expressly in point. The marginal note in that case is, "Where a Court of Requests has exclusive jurisdiction of debts up to a certain amount, the plea must state in terms that defendant was not indebted

(a) Cro. Eliz. 260.

Mornington, ante, vol. 4, p. 213.(b) See also *Bac. Abr. tit. "Pleas and Plead."* (1), Pleas in bar, sect. 5; *Benham v. Earl of*

/ (c) 9 A. & E. 499; S. C. 1 P. & D. 328.

beyond that amount. It is not sufficient to allege that he was not indebted in beyond a smaller sum, which is specified: for a plea must be so shaped that the averments, if traversed, will be material and conclusive whether found for the plaintiff or defendant; and this averment would not be so, if found for the plaintiff." There the defendant had pleaded as to 1*l.* 13*s.* 8*d.*, that he was not indebted in a greater sum, and that the said sum being a debt not exceeding 40*s.*, was recoverable in a Court of Requests. Upon argument on the part of the plaintiff it was contended, that, as the allegation in the plea was, that the defendant was not indebted to the plaintiff in a greater amount than 1*l.* 13*s.* 8*d.*, to reply that he was, would be to tender an immaterial issue; and that it was not incumbent on the plaintiff to reply that the debt exceeded 40*s.*, when the defendant had not specifically alleged the contrary. For the defendant it was contended, that the plaintiff might have taken a material issue by averring that the debt exceeded 40*s.*; and that the denial that the defendant owed more than 1*l.* 13*s.* 8*d.*, was a denial *à fortiori* that the debt exceeded 40*s.* The Court took time to consider, and in the succeeding Term Lord *Denman* delivered the judgment of the Court in favour of the plaintiff. His Lordship said, "If any averment at all as to the amount of the debt be necessary, the form commonly used is clearly the correct and proper one; namely, that the defendant was not indebted to the plaintiff 'in any sums of money amounting to forty shillings,' or 'to the amount of forty shillings.' On such an averment a material issue might be taken; and though it is true that, if the present averment be traversed and found for the defendant, it would be material and conclusive, yet if found for the plaintiff it would be otherwise. The plaintiff, however, is entitled to have the plea of the defendant so framed as that the averments in it, if traversed, will be material and conclusive whichever way they be found; and their not being so framed is a good ground of demurrer."

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Lord DENMAN, C. J.—That case is in point. There must be judgment for the plaintiff.

PER CURIAM.

Judgment for Plaintiff.

THOMAS v. FENTON.

Payment within the 55 Geo. 3, c. 184, s. 19, of a bill of exchange, so as to render it no longer negotiable, must be a payment by the party ultimately liable.

Therefore, where a bill of exchange, indorsed in blank by the drawer, was overdue and unpaid, and an action had been commenced by C. the holder, against the acceptor, and the plaintiff, who was a stranger to the bill, paid the amount of the bill and costs to C., who delivered the bill to him: *Held*, that the plaintiff might maintain an action on the bill against the drawer; and that the bill did not require a fresh stamp, as being re-issued after payment.

In an action by indorsee against drawer of a bill of exchange, *Held* that the issue that the bill was accepted for the accommodation of the defendant, was proved by evidence that the bill had been accepted to take up a former acceptance by the same party, given for the accommodation of the defendant; and that it was not necessary to plead those facts in extenso.

A declaration by indorsee against drawer of a bill of exchange, averred by way of excuse for want of notice of dishonour that C. F. accepted the bill for the accommodation of the defendant, and that at the time of making and accepting the said bill, and from thence until and at the time when the same was so presented for payment, C. F. had not any effects of the defendant, nor had he received any consideration for the acceptance or payment of the said bill, nor had the defendant sustained any damage by reason of his not having had notice of the nonpayment thereof: *Held*, on motion in arrest of judgment, that it was not necessary that the declaration should deny that the drawer had any reasonable expectation when he drew, or during the currency of the bill, that he would have assets at the time of its maturity in the hands of the drawee.

The reasonable expectation of assets entitles to notice only on the ground that the drawer, under the circumstances which raise that expectation, may be damnified: to allege, therefore, that he has sustained no damage, removes the ground on which the necessity of notice arises (a).

And there is no distinction in this respect between a bill of exchange and a banker's cheque.

/(a) See per Curiam, in *Carter v. Flower*, ante, vol. 4, p. 529, 535.

making and accepting the said bill, and from thence and until and at the time when the same was so presented for payment, the said Charles Fenton, the elder, had not any effects of the defendant, nor had he received any consideration for the acceptance or payment of the said bill, nor hath the defendant sustained any damage by reason of his not having had notice of the nonpayment thereof, of all which premises, the defendant, on the 2nd of September, 1846, had notice (a). And the defendant then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill, when he, the defendant, should be thereunto afterwards requested; yet the defendant hath disregarded his promise, and hath not paid the amount of the said bill, or any part thereof. To the plaintiff's damage, &c.

The defendant pleaded first, That he did not make the said supposed bill of exchange in the declaration mentioned as therein mentioned. Conclusion to the country, &c.

Secondly. That he, the defendant, did not indorse the said bill of exchange in the said declaration mentioned to the plaintiff, as is therein alleged. Conclusion to the country, &c.

Thirdly. That the said bill of exchange in the declaration mentioned was not presented to the said Charles Fenton, the elder, for payment thereof on the day when the same became due, in manner and form as the plaintiff hath above alleged, &c. Conclusion to the country, &c.

Fourthly. That the said bill in the declaration mentioned was not accepted for his, the defendant's accommodation, as in the declaration alleged. And the defendant further says, that at the time when the said bill in the said declaration mentioned was drawn, the said Charles Fenton, the elder, had in his hands divers effects of the defendant of great value, to wit, to the amount of the said bill. Conclusion to the country, &c.

Fifthly. That the said indorsement of the said bill by the defendant was an indorsement in blank, and was not a

(a) *Quere*, if this excuse for omitting to give notice be sufficient upon special demurrer? See *Carter v. Flower*, *ante*, vol. 4, p. 529.

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Lord DENMAN, C. J.—That case is in point. There must be judgment for the plaintiff.

PER CURIAM.

Judgment for Plaintiff.

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Payment within the 55 Geo. 3, c. 184, s. 19, of a bill of exchange, so as to render it no longer negotiable, must be a payment by the party ultimately liable.

Therefore, where a bill of exchange, indorsed in blank by the drawer, was overdue and unpaid, and an action had been commenced by C. the holder,

against the acceptor, and the plaintiff, who was a stranger to the bill, paid the amount of the bill and costs to C., who delivered the bill to him: *Held*, that the plaintiff might maintain an action on the bill against the drawer; and that the bill did not require a fresh stamp, as being re-issued after payment.

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The reasonable expectation of assets entitles to notice only on the ground that the drawer, under the circumstances which raise that expectation, may be damnified: to allege, therefore, that he has sustained no damage, removes the ground on which the necessity of notice arises (a).

And there is no distinction in this respect between a bill of exchange and a banker's cheque.

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making and accepting the said bill, and from thence and until and at the time when the same was so presented for payment, the said Charles Fenton, the elder, had not any effects of the defendant, nor had he received any consideration for the acceptance or payment of the said bill, nor hath the defendant sustained any damage by reason of his not having had notice of the nonpayment thereof, of all which premises, the defendant, on the 2nd of September, 1846, had notice (a). And the defendant then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill, when he, the defendant, should be thereunto afterwards requested; yet the defendant hath disregarded his promise, and hath not paid the amount of the said bill, or any part thereof. To the plaintiff's damage, &c.

The defendant pleaded first, That he did not make the said supposed bill of exchange in the declaration mentioned as therein mentioned. Conclusion to the country, &c.

Secondly. That he, the defendant, did not indorse the said bill of exchange in the said declaration mentioned to the plaintiff, as is therein alleged. Conclusion to the country, &c.

Thirdly. That the said bill of exchange in the declaration mentioned was not presented to the said Charles Fenton, the elder, for payment thereof on the day when the same became due, in manner and form as the plaintiff hath above alleged, &c. Conclusion to the country, &c.

Fourthly. That the said bill in the declaration mentioned was not accepted for his, the defendant's accommodation, as in the declaration alleged. And the defendant further says, that at the time when the said bill in the said declaration mentioned was drawn, the said Charles Fenton, the elder, had in his hands divers effects of the defendant of great value, to wit, to the amount of the said bill. Conclusion to the country, &c.

Fifthly. That the said indorsement of the said bill by the defendant was an indorsement in blank, and was not a

(a) *Quere*, if this excuse for omitting to give notice be sufficient upon special demurrer? See *Carter v. Flower*, *ante*, vol. 4, p. 529.

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special indorsement; and that after the said bill became due and payable, and before the commencement of this suit, and before the plaintiff became, or was the holder of the said bill, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and forty-six, the same was in the hands of one Henry Clark, who then was the holder thereof, and entitled to the proceeds thereof, and that whilst the said Henry Clark was so the holder thereof as aforesaid, and before the said indorsement thereof to the plaintiff, and after the said bill became and was due and payable according to the tenor and effect thereof, and before the commencement of this suit, to wit, on the said 1st day of June in the year of our Lord one thousand eight hundred and forty-six, the said Charles Fenton, the elder, so being the person to whom the said bill was and is directed as aforesaid, and having before then accepted the same, and being then the acceptor thereof, paid to the said Henry Clark, who then accepted and received of and from the said last mentioned Charles Fenton, a large sum of money, to wit, 19*l.* 2*s.* 6*d.*, in full satisfaction, and discharge of all the principal and interest then due on the said bill, and of all damages and causes of action then accrued to the said Henry Clark, so being then the holder of the said bill in respect of the previous nonpayment thereof. And the defendant further saith, that the said plaintiff first took and received the same, and first became the holder thereof after the said payment of the same by the acceptor thereof as aforesaid, and after the same became and was due and payable. Verification, &c.

As to the first, second, third, and fourth pleas, the plaintiff joined issue;

And as to the fifth, he replied, that the said Charles Fenton, the elder, did not pay to the said Henry Clark, in the said last plea mentioned, nor did the said Henry Clark accept and receive of or from the said Charles Fenton, the elder, the said sum of money in the said last plea mentioned in full satisfaction, and discharge of all principal and interest then due on the said bill, and of all

damages and causes of action in the said first plea alleged to have then accrued to the said Henry Clark, in manner and form, &c. Conclusion to the country.

Upon which replication the defendant joined issue.

When the case came on for trial before the undersheriff of Middlesex, on the 11th of February, 1847, it appeared from the undersheriff's notes, that a witness of the name of Charles Fenton, the elder, the father of the defendant, and the acceptor of the bill, was called, who proved that the bill for 15*l*, for which this action was brought, was drawn by the defendant, and accepted by the witness. The bill was then put in and read, subject to an objection by the defendant's counsel, that it had been paid and re-issued, and therefore required a new stamp. The witness went on to state that the bill, together with another, was accepted for the defendant's accommodation, and that he, the witness, received no part of the proceeds, nor was he indebted to the defendant when it was drawn. That the defendant agreed to provide for it when due. That it was presented for payment on the 1st of September by the young man of a Mr. Biggenden. That he informed the defendant that it had been presented, and not paid. That the defendant called day after day and said he would attend to it, but that they could not take any law proceedings till the 24th of October. That he had been served with a writ at the suit of one Clark, on one of these bills. That he asked the attorney for time in order that he might see the defendant about it. That the plaintiff, who was his son-in-law, called in, and out of goodwill of his own, and without telling him that he was going to do it, paid the money out of his own pocket. On his cross-examination he stated that there were several former bills which had been burnt, of which he was also acceptor, and all of which were for the defendant's accommodation, and for which the witness had received no value whatever. That the two bills, of which the present was one, were drawn by the defendant, who said he could get them discounted, and take up the former bills. A witness of the name of Gant was then called, who proved

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that he went to Mr. Biggenden, a solicitor, and said he had come to settle the action of *Clark v. Fenton*, on the part of the plaintiff. That he accordingly then paid the amount of the debt and costs, which he had received from the plaintiff, and had the bill delivered up to him. That it bore the indorsement of the defendant in blank. This evidence closed the case for the plaintiff. The defendant's counsel then objected that the plaintiff must be nonsuited on three grounds:—First. That the bill was invalid for want of a fresh stamp, having been re-issued after it became due and after it had been paid. Secondly. That the issue that the bill was accepted for the accommodation of the defendant was not proved, and for this he cited *Boulton v. Coghlan* (a). Thirdly. That there was no proof of indorsement by the defendant to the plaintiff, because he never indorsed *animo transferendi* (b). The undersheriff directed a verdict for the plaintiff for the amount claimed, reserving leave to the defendant to move to enter a nonsuit.

A rule having been obtained by *Pearson* calling upon the plaintiff to shew cause why the verdict should not be set aside, and a new trial had; or why a nonsuit should not be entered; or why the judgment should not be arrested.

W. R. Cole shewed cause (c). The bill in this case did not require a fresh stamp; for the payment contemplated by the statute is a payment by the party ultimately liable, *Lazarus v. Cowie* (d); and not a mere payment by a party who takes up the bill in order to sue upon it. A bill may be indorsed at any time before payment. The plaintiff, therefore, sues as indorsee of the bill, which has not yet been paid, in the proper sense of that word. At the trial it was sought to shew that this was a payment on behalf of the acceptor, and in that case no doubt the present plaintiff could not maintain this action; but the proof in that respect

✓ (a) 1 Bing. N. C. 640; S. C. 1 Scott, 588.

(b) This point was abandoned on the argument.

(c) In Easter Term.

✓ (d) 3 Q. B. 459; S. C. 2 G. & D. 487.

failed. As to the objection that the issue, that the bill was accepted for the accommodation of the defendant, was not proved, because it appeared that the bill had been accepted to take up a former acceptance of the same party's, given for the accommodation of the defendant; the transaction is substantially the same, whether the facts had been set out in extenso on the pleadings or not. In either case the bill would properly be averred to have been accepted for the accommodation of the defendant. It is urged in arrest of judgment, that the declaration does not sufficiently excuse the want of notice of dishonour; because it does not go on to say, in addition to the allegations, "that the bill was an accommodation bill, and that the acceptor had not, at the time of making and accepting the said bill, and from thence until and at the time when the same was so presented for payment, any effects of the defendant, nor had he received any consideration for the acceptance or payment of the said bill, and that the defendant had not sustained any damage by reason of the want of notice of nonpayment thereof;"—that the defendant had no reasonable expectation at the time of drawing that he would have assets in the hands of the acceptor. In *Fitzgerald v. Williams* (a), it was held that, in an action against the drawer of a bill of exchange, where the plaintiff, by way of excuse for not giving notice of dishonour, averred that the defendant had no funds in the hands of the acceptor, nor had he sustained any damage for want of notice; and the defendant had pleaded that he had sustained damage, because the acceptor had promised him to provide for the bill; it was not incumbent on the plaintiff to prove that the defendant had sustained no damage. In *Terry v. Parker* (b), it was held, that want of effects in the hands of the drawee excused the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonour to the

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✓(a) 6 Bing. N. C. 68; S. C. 8 Scott, 271.

✓(b) 6 A. & E. 502; S. C. 1 N. & P. 752.

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drawer; and although the declaration in that, as well as the former case, contained the allegation that the defendant had not any reasonable grounds for expecting that the acceptor would have assets, yet the judgment in both cases is put broadly on the ground that the want of effects in the hands of the drawee is a sufficient excuse. The form of such a declaration contained in 2 *Chit. on Plead.* 110, 7th ed., has no such averment. The case of *Kemble v. Mills* (a) is, however, exactly in point. There the marginal note is, "want of notice of the dishonour of a cheque on a banker, is sufficiently excused, *primâ facie*, by alleging that the banker had no effects of the drawer, and had received no consideration for payment of the cheque, and that the defendant had sustained no damages by reason of his having no notice of dishonour,—at least upon general demurrer." There, *Tindal*, C. J., says (b), "It is urged, that the allegations in the declaration are not sufficient to excuse the want of notice, since, notwithstanding what is there stated, the plaintiff may have had a just and reasonable expectation of assets coming to the hands of the bankers before the cheque was presented for payment; but, upon general demurrer, it is sufficient if we see that the plaintiff has excused himself upon the broad ground, that the defendant had no assets in the banker's hands; that is the ground upon which the early cases were decided, and if the defendant wished to object to the form of the declaration, he should have demurred specially. Upon this general demurrer, it seems to me that the plaintiff is entitled to judgment."

Pearson, in support of the rule. It is submitted, first, that the bill in this case having been paid after it became due, it could not be re-issued without a fresh stamp; *Bartrum v. Caddy* (c). The 55 Geo. 3, c. 184, s. 19, says, that

✓ (a) 1 M. & G. 757; S. C. 2 (c) 9 A. & E. 275; S. C. 1 P. Scott, N. R. 121; 9 Dowl. 446. & D. 207.

(b) 1 M. & G. 767.

"all promissory notes, bills of exchange, drafts or orders for money, not hereby allowed to be re-issued, shall, upon any payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available in any manner whatsoever, but shall be forthwith cancelled by the person or persons paying the same," &c. The payment here, though not by the direction of the acceptor, was certainly a payment on his behalf. Secondly, it is submitted, that the proof did not support the allegation that the bill was accepted for the accommodation of the defendant. It appears that it was accepted to take up a former bill, of which the same party was acceptor; consequently, it was for the accommodation of the acceptor as much as of the drawer, as it enabled him to withdraw the former bill on which he was liable. In *David v. Preece* (a) to an action on a promissory note, the defendant pleaded that the holder accepted another note with an additional party, in satisfaction of the first. It appeared in evidence that this other note had been given and accepted in satisfaction, not of the note declared, but of an intermediate note which had been given without the additional party, in satisfaction of the note declared on. And it was held, that this was a variance, and that the Judge at nisi prius had no power to amend the plea by substituting a description of the intermediate note. So in *Boulton v. Coghlan* (b), where the defendant pleaded that a promissory note on which the plaintiff declared was made by the defendant in December, 1833, in pursuance of an agreement thereby to secure J. A. money, lost to him at play, in July, 1833; it was held, that this plea was not supported by evidence, that in July, 1833, the defendant gave a bill of exchange, payable six months after date, for 87*l*, lost at play, which bill J. A. indorsed to V. K., and that in December, 1833, the defendant substituted for this bill of

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✓ (a) 5 Q. B. 440.

✓ (b) 1 Bing. N. C. 640; S. C. 1 Scott, 588.

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exchange a promissory note for 100*l.*, bearing date September, 1833, and payable to the order of V. K., six months after date, being the note on which the plaintiff sued. Thirdly, It is not a sufficient excuse for not giving notice of dishonour to the drawer, to say that he had no effects in the hands of the acceptor. [*Coleridge, J.*—It says also, that he has not sustained any damage by reason of his not having had notice of the nonpayment]. The ground upon which it has been held that where the drawer has no effects in the hands of the acceptor, notice of dishonour is not necessary to be given to him, is, that it is a species of fraud in him to draw the bill, knowing that he has no effects in the hands of the drawee, and, therefore, had no right to draw (*a*). But if he had good reason for believing that the drawee would have effects in his hands, that ground would fail. In *Legge v. Thorpe* (*b*), it was held, that a protest for non-acceptance of a foreign bill of exchange, was not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, nor probability of any effects in the hands of the drawee at the time, and it do not appear that there was any fluctuating balance of assets between them unascertained at the time, which might then have afforded probable ground of belief to the drawer that his bill would be honoured. In that case, Lord *Ellenborough, C. J.*, says, “I have often regretted that the strict general rule requiring notice of the dishonour to be given was departed from in the case of *Bickerdike v. Bollman* (*c*), on account of the drawer having no effects in the hands of the drawee; because, though I do not question the foundation on which that distinction rests, after the sanction which it has since received; yet I meet with continual instances of inconvenience resulting in practice from it.” “If one party draw on another without any prospect of having value in the other’s hands to answer it, he knows beforehand that his bill

✓ (*a*) See *Bickerdike v. Bollman*, (b) 12 East, 171.
 1 T. R. 405. ✓ (*c*) 1 T. R. 405.

will not be honoured; and therefore notice cannot be necessary to tell him that which he must know already, not only that he had no value, but that he could have none which could warrant him to draw the bill." That case, therefore, shews that it is necessary, in order to excuse notice of dishonour, not only that the drawer should have no effects, but also that he should have no reasonable ground for believing that he would have any effects in the hands of the drawee. In *Rucker v. Hiller* (a), it was held, that where one draws a bill of exchange with a bonâ fide reasonable expectation of having assets in the hands of the drawee, as by having shipped goods on his own account, which were on their way to the drawee, but without the bill of lading or invoice, the drawer is entitled to notice of the dishonour, though, in fact, the goods had not come to the hands of the drawer at the time when the bill was presented for acceptance (or he had rejected them), and he returned it marked "no effects." So in *Spooner v. Gardiner* (b), where the drawer had no effects in the hands of the acceptor, from the time of drawing until the bill became due, but, previously to the delivery of the bill, had given some acceptances of his, upon which the acceptor had raised money, part of which acceptances had been returned dishonoured, and others were outstanding; it was held, that the drawer was entitled to notice of its dishonour by the acceptor. The cases upon this subject will be found collected in *Har. Dig.*, tit. "*Bills of Exchange*," Div. X., sect. 1, and in the notes to *Bickerdike v. Bollman*, in 2 *Smith's Leading Cases*, p. 28, 29. *Kemble v. Mills* (c) was the case of a cheque, and had the declaration contained the allegation in question, it would have disclosed an indictable offence. [*Coleridge, J.*—According to your argument the drawer would always be entitled to notice, except in case of fraud on his part in drawing the bill.] It is submitted that

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✓(a) 16 East, 43.
(b) R. & M. 84.

✓(c) 1 M. & G. 757; S. C. 2 Scott,
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the declaration must negative every possible case in which the drawer would be entitled to notice; *Carter v. Flower* (a). [Coleridge, J.—What do you say to the case of *Fitzgerald v. Williams* (b)? There the Chief Justice says, “The plaintiff having averred as an excuse for not giving notice of the dishonour of the bill, that the defendant had no funds in the acceptor’s hands, assigned a sufficient excuse if he had stopped there; for if the defendant had no funds in the hands of the acceptor he was not damnified; if he was, after the issue he has taken upon the whole allegation, the proof would have come more properly from him.”] There the allegation was, that he never had any reasonable ground for expecting that he had or would have any effects in the hands of the acceptor.

COLERIDGE, J.—I am of opinion that there is no weight in the first objection which has been raised, namely, that this bill required a fresh stamp. It appears that the facts are as follow. The bill upon which this action is brought, bearing the blank indorsement of the defendant, and being over due and unpaid, was delivered over to the plaintiff on his paying the then holder the amount of the bill and costs. The bill was negotiable till payment; and by payment is meant, payment by the party ultimately liable; for otherwise, no indorser who had been compelled to pay a subsequent indorser could recover upon a bill. The payment in this case, therefore, was not such a payment as was contemplated by the statute, and the objection that the bill required a fresh stamp cannot be sustained.

As to the second objection I am of opinion, that there was sufficient evidence here to support the allegation that the bill was accepted for the accommodation of the defendant. Such is the effect of the whole facts if they had been pleaded in extenso, and, therefore, I think there is no variance. In the cases cited on this point, the allegations

✓(a) *Ante*, vol. 4, p. 529; S. C. 16 M. & W. 743.

✓(b) 6 Bing. N. C. 70.

were of one state of facts and the proof of another; and though the ultimate practical effect of the whole transaction upon the rights of the parties might have been the same, yet the variance was clear. Here the evidence supports the allegation, by shewing such facts as made it an acceptance for the accommodation of the defendant.

On the remaining objection, I will take time to consider.

Cur. adv. vult.

COLERIDGE, J., now delivered judgment.—This was a rule to arrest the judgment after verdict, for a defect in the declaration. In an action against the drawer of a bill of exchange, a want of notice of dishonour is excused by an allegation that there were no effects in the hands of the drawer at the maturity of the bill; that it was an accommodation acceptance, and that the drawer has sustained no damage by want of notice. And the question is, whether this allegation is sufficient, without going on to deny that the drawer had any reasonable expectation when he drew, or during the currency of this bill, that there would be assets of his at the time of its maturity in the hands of the drawee.

The question must be considered as on general demurrer, and, so considered, it seems to me that the declaration is sufficient.

It is alleged that the drawer has sustained no damage by want of notice, and that, to use the language of *Tindal*, C. J., in *Kemble v. Mills* (a), “goes to the whole ground of defence on the want of notice.” The reasonable expectation of assets entitles to notice only on the ground that the drawer, under such circumstances as raise that expectation, may be damnified by the want of it; to allege, therefore, that he has sustained no damage removes the ground on which the notice is necessary. It may also be argued, that the

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✓ (a) 1 M. & G. 764.

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plaintiff is not bound in the first instance to allege that which cannot be within his knowledge, and that such a fact should properly come by way of plea. The case above cited is a direct authority, unless there is a distinction between a bill and a banker's cheque. No distinction seems to have been made in the argument or in the judgment, nor does it seem to me that as to this point any exists. The rule, therefore, will be discharged.

Rule discharged (*a*).

✓ (*a*) See *Carter v. Flower*, ante, vol. 4, p. 529.

REGINA v. GEORGE BEST and Others, Esquires, Justices
of SURREY.

The appointment of a surveyor of the highways by justices at a special sessions, upon neglect or refusal on the part of the parish to nominate and elect a surveyor, under the 5 & 6

✓ Wm. 4, c. 50, s. 11, is invalid, if made at the same sessions at which the neglect or refusal appears.

The 5 & 6

✓ Wm. 4, c. 50, s. 6, which enacts that the inhabitants of a parish maintaining its own highways,

shall proceed to the election of surveyors of the highways "at their first meeting in vestry for the nomination of overseers of the poor in every year," requires the vestry to be one of which due notice has been given in pursuance of the 58 Geo. 3, c. 69, s. 1.

Where it appears that two rates for the repair of the highways are co-existent, the Court will not presume that they are made for the same period of time, and, therefore, invalid.

A RULE had been obtained in Hilary Term last, calling upon George Best, Henry Halsey, and Henry Drummond, Esqrs., three justices of the peace for the county of Surrey, and upon one John Weaver, to shew cause why a writ of mandamus should not issue directed to the said justices, commanding them to grant a warrant of distress, under their hands and seals, for levying on the goods of the said John Weaver the sum of 1*l*. 11*s*. 5*d*., rated and assessed upon him, in and by a rate of assessment made for the repair of the highways of the parish of Shalford, in the county of Surrey.

The affidavits upon which this rule was obtained shewed that the parish of Shalford was situated in the Guildford division of the county of Surrey, and was a parish maintaining its own highways within the meaning of the stat. 5 & 6 Wm. 4, c. 50. That on Sunday morning, the 22nd of March, 1846, a notice in writing was affixed by the

direction of the then churchwardens and overseers of the parish, on the principal door of the parish church of the said parish, signed by the churchwardens, calling and appointing a parish vestry to be held in the vestry room of the said parish on the then next Wednesday, at eleven o'clock, for the purpose of nominating new officers for the parish for the then ensuing year. That certain inhabitants of the parish met accordingly on the Wednesday, and nominated certain persons to be recommended to the magistrates in the usual way, as and for overseers of the poor, and they also elected two persons to serve the office of surveyors of the highways of the parish for such ensuing year. These elections were, however, it was said, void, as no sufficient notice had been given of the vestry meeting being about to be held. The affidavits went on to state, that at a special sessions for the highways held at Guildford aforesaid on the 11th of April, 1846, it appeared upon oath before the justices then and there assembled, that the inhabitants of the parish of Shalford had neglected to nominate and elect a surveyor or surveyors of the highways of the said parish, in manner in and by the said act mentioned and directed, inasmuch as no public notice had been given of the said vestry three days at the least before the day appointed for holding the same, according to the statutes in such case made and provided; and it also then and there appeared on oath before the said justices, that proper notice had not been given by the chairman of the said meeting in vestry to the persons so nominated or elected as surveyors of the said parish, nor to the outgoing surveyors thereof as required by the provisions of the 5 & 6 Wm. 4, c. 50, s. 6; whereupon the said justices then and there assembled did accordingly nominate Sir Henry Edmund Austin and George Davis, of Shalford, aforesaid, to be surveyors of the highways of the said parish until the then next annual meeting for the nomination of overseers, or for the election of surveyors for the said parish, and they were accordingly appointed to such office by writing under the hands and seals of two of

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the said justices. That Sir H. E. Austin and G. Davis, having obtained the books from their predecessors in office, did, as such surveyors, on the 20th of November, 1846, make a certain highway rate for the repairs of the highways of the said parish, and the same was signed by them, and duly allowed on the 21st of the same month by two justices of the peace acting in and for the said division of the said county, and published, and notice thereof given to the parishioners in the way required by the said act. The affidavits then stated that one John Weaver, an inhabitant of the parish, was thereby assessed and rated in respect of certain property, to the amount of 1*l.* 11*s.* 5*d.*, which was duly demanded of him, but which he refused to pay. That an information was laid against him, and a summons granted for him to appear before two justices of the peace on the 5th of December, 1846. That he appeared before the justices, and objected to the appointment of the surveyors. That the case was adjourned for consideration till the 19th of December, when the parties again appearing before the justices, the justices refused to grant a warrant of distress to levy the said rate upon the goods and chattels of the said John Weaver. Whereupon the present rule was accordingly obtained.

The affidavits in answer shewed that a notice of a vestry meeting had been affixed by the way-warden, before nine o'clock in the morning, on Sunday, the 22nd of March, 1846, on the principal door of the parish church, dated the 21st of March, and calling a meeting for the Wednesday following, the 25th. They then stated the proceedings that took place at the election of the surveyors on the 25th; and that one N. Mitchell, and one J. Budd, were elected as such unanimously. That at a meeting of the magistrates for the Guildford division on the 25th of March, they confirmed the appointment of the overseers who had been elected at the same meeting, and that no objection was made to the appointment of those officers who had served ever since. That at a special sessions for the highways held at Guildford,

on the 25th of April following, the outgoing surveyors laid their accounts before the justices, and delivered to them at the same time a statement in writing of the names and residences of the said N. Mitchell and J. Budd, as the persons appointed to succeed them as surveyors of the highways for the parish of Shalford aforesaid. They also shewed that Sir H. E. Austin and G. Davis did, on the 1st of October following, then assuming to act as surveyors of the highways for the said parish, make a rate for the repairs of the highways of the said parish, which was allowed by the justices acting for the said division on the 10th of the same month; that a part only of such rate was collected; that certain of the inhabitants of the said parish refused to pay such rate, and that the said Sir H. E. Austin and G. Davis proceeded, without enforcing the said rate, and without giving any notice of their intention so to do, to make on the 20th of November last, another rate for the repairs of the highways for the parish aforesaid. And that there were then in existence two several rates made by the said Sir H. E. Austin and G. Davis, on the 1st of October, 1846, and the 20th of November, 1846, respectively, contrary to the form of the statutes.

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Wordsworth shewed cause (a). It is submitted, first, that Mitchell and Budd were properly elected as surveyors at the vestry meeting on the 25th of March. It may be conceded that if a notice of that meeting were necessary to be given, "three days at the least," before the day to be appointed for holding such vestry, as required by the 58 Geo. 3, c. 69, s. 1 (b), the notice in this case was insuffi-

(a) In Easter Term.

(b) 58 Geo. 3, c. 69, s. 1.
"Whereas it is expedient to regulate the manner of holding parish vestries, and the right of voting therein; be it enacted, that from and after the first day of July, 1818, no vestry meeting of the inhabitants in vestry of or

for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the

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cient(a); but it is submitted that no such notice was necessary. All that the General Highways Act, the 5 & 6 Wm. 4, c. 50, s. 6 (b), requires, is, that the election shall take place at the "first meeting in vestry for the nomination of overseers." [*Erle, J.*—That must mean a meeting *legally* held.] Secondly, Assuming the appointment of Mitchell and Budd to be invalid, that of Sir H. E. Austin and G. Davis was also bad, in being made at the same special sessions at which the neglect of the inhabitants to nominate appeared. The 5 & 6 Wm. 4, c. 50, s. 11 (c), enacts, that

parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel."

(a) *Montagu Chambers*, in support of the rule, referred to *Reg. v. Justices of Salop*, 8 A. & E. 173; and *Dobson v. Fussy*, 7 Bing. 305, on this point.

(b) 5 & 6 Wm. 4, c. 50, s. 6. "That the inhabitants of every parish maintaining its own highways, at their first meeting in vestry for the nomination of overseers of the poor in every year, shall proceed to the election of one or more persons to serve the office of surveyor in the said parish for the year then next ensuing: Provided always, that any outgoing surveyor shall continue to act until his successor shall be appointed, and shall be re-eligible, and may be re-elected, and shall in such case continue to act and remain in office, any thing herein contained to the contrary notwithstanding; and in such case notice of such election shall be given by the chairman to the person elected, and to the

outgoing surveyor: Provided always, that in any parish where there is no meeting in the year for the nomination of overseers of the poor, the inhabitants contributing to the highway rate shall meet at their usual place of public meeting upon the 25th day of March, or if that should happen to be a Sunday or Good Friday, then on the day next following, or within fourteen days next after the said 25th day of March in every year, to elect one or more persons to serve the office of surveyor for the said parish; which surveyor shall repair and keep in repair the several highways in the said parish for which he is appointed, and which are now or hereafter may become liable to be repaired by the said parish."

(c) 5 & 6 Wm. 4, c. 50, s. 11. "That in case it shall appear on oath to the justices at a special sessions for the highways that the inhabitants of any parish have neglected or refused to nominate and elect a surveyor or surveyors in manner and for the purposes aforesaid, or that the outgoing surveyor, except he had been di-

if it shall appear to the justices in special sessions assembled, "that the inhabitants have neglected or refused to appoint surveyors," it shall and may be lawful for such justices, "at their *next* succeeding special sessions for the highways," &c., "to appoint any person whom they may think fit to be a surveyor for such parish," &c. Thirdly, The rate which it is now sought to enforce is invalid, as it appears that only part of it having been levied, another rate has been imposed; so that there are two co-existing rates for the same period of time, which is contrary to law. In *Reg. v. The Inhabitants of Fordham (a)*, this very point was decided. There it was held, that a rate was bad, which was made for a period for which a rate had already been made, and not quashed. Fourthly, This is not the proper mode of proceeding. The surveyors, who were aggrieved by the refusal of the justices to make this order, should have appealed to the Quarter Sessions under sect. 105. In *Rex v. The Justices of St. Albans (b)*, Abbott, C. J., says, "Supposing that the words of the 81st section, taking away the certiorari, are to be confined to cases in which an appeal is given, then the

rected by the inhabitants so to do, has delivered no statement of the name and residence of his or their successor or successors, or that the surveyor is dead, or has ceased to possess the qualification, or is or has become disqualified in any manner herein mentioned, or that he has neglected to act, or refused to carry into operation the duties imposed upon him by this act, it shall and may be lawful for such justices, and they are hereby authorized and required, by writing under their hands, at their next and succeeding special sessions for the highways to dismiss such surveyor so neglecting to act or refusing to carry into operation the duties imposed upon him by this act, and to

appoint any person whom they may think fit to be a surveyor for such parish till the annual meeting then next ensuing for the nomination of overseers or for the election of surveyors as aforesaid, and with or without such salary, as to the said justices shall seem fit and proper; and the said surveyor, when so appointed, shall be invested with the same powers, and be subject to the same duties, forfeitures, and penalties as any surveyor elected by the inhabitants of any parish as aforesaid would have been."

✓(a) 11 A. & E. 73; S. C. 3 P. & D. 95.

✓(b) 3 B. & C. 698; S. C. 5 D. & R. 538.

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applicant should have made out that no appeal lies against the appointment of surveyors. I think that such an appeal does lie. The words of the act are general, and give an appeal to any person aggrieved by any thing done in pursuance of the act by any justice of the peace or other person. The appointment of surveyors is a thing done in pursuance of the act, and I cannot see the force of the distinction between acts done by justices at the petty sessions or elsewhere; nor has the party grieved any other remedy given by the act." [*Erle, J.*—Ought not the party aggrieved by the rate to appeal under this section?] He might, perhaps, have done so, but it is submitted he was not bound to take that course. Lastly, If there is a doubt in this case as to the validity of the rate, the Court will not place the justices in jeopardy, by commanding them to issue this warrant when another remedy exists. [*Erle, J.*—The justices are relieved from responsibility, under the late act (a), where this Court issues a peremptory mandamus].

Montagu Chambers and *Phipson*, in support of the rule. As to the first point, the 5 & 6 Wm. 4, c. 50, s. 6 (b), enacts, that "the inhabitants of every parish maintaining its own highways, at their first meeting in vestry for the nomination of overseers of the poor in every year, shall proceed to the election of one or more persons to serve the office of surveyor in the said parish for the year then next ensuing." The meeting in vestry must be one held according to law: and by the 58 Geo. 3, c. 69, s. 1 (c), it is enacted, that "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry," &c. It was necessary, therefore, to give three clear days' notice

/(a) 6 & 7 Vict. c. 67.

(c) See this section, *ante*, p. 43.

(b) See this section, *ante*, p. 44, n. (b).
 n. (b).

of the vestry being held, and it is conceded that no such notice was in this case given. As to the second point, the statute 5 & 6 Wm. 4, c. 50, s. 11 (a), may be taken to be directory only, and not compulsory; and as the outgoing surveyor is to remain in until his successor be appointed, there may be good reasons why the justices should at once proceed to election at the same sessions at which the neglect appears. In *Rex v. The Justices of Denbyshire* (b), which was a mandamus to justices to appoint a surveyor of the highways under the 13 Geo. 3, c. 78, s. 1, it appeared that the terms of the statute only authorized the appointment at the first special sessions after the Michaelmas Quarter Sessions; but the Court held, that that part of the act was only directory to the magistrates to make the appointment at the time mentioned, and they granted a mandamus to them to appoint at a subsequent sessions. The case of *Rex v. Sparrow and Others* (c) was there referred to, in which the Court held that justices might appoint overseers although the time limited by the statute 43 Eliz. c. 2, namely, within Easter week, or within one month after Easter, had expired; and the Court there, in giving judgment, said, that "though it is a new law, yet against the justice and meaning of it no negative shall be implied;" and that "being for the maintenance of the poor, it must be construed liberally;" and they termed their decision "a construction ex necessitate." As to the third point, there is nothing here to shew that these two rates are for the same period of time. The Court will not presume that they were illegally made. In *Reg. v. The Inhabitants of Fordham* (d), the rates were for concurrent periods. [They were stopped upon this point by the Court.] As to the fourth point, it could not be necessary for the surveyors to proceed by way of appeal where the justices have refused to make an order. The last objection

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n. (c).

(b) 4 East, 142.

(c) 2 Stra. 1123.

✓ (d) 11 A. & E. 73; S. C. 3 P.
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is answered by the late act which protects justices obeying a peremptory mandamus.

Cur. adv. vult.

The following judgment was now delivered by COLERIDGE, J., for ERLE, J.—On shewing cause against a rule for a mandamus commanding the justices to take steps for levying a rate for highways, it appeared that the validity of the appointment of surveyors for the highways by the vestry was disputed, on the ground that a notice on Sunday for a vestry on Wednesday was not a notice of three days at least; and these facts were shewn to justices at a special sessions for highways, and they at the same sessions appointed the surveyors, who made the rate sought to be enforced.

The question raised was, whether this appointment was valid under the 5 & 6 Wm. 4, c. 50, s. 11, whereby it is enacted, that in case the neglect of a parish to elect a surveyor appears on oath to justices at a special sessions for the highways, they may at their next succeeding special sessions for the highways appoint a surveyor. And I am of opinion that it was not. The enactment is clear, that the interval of time between two special sessions for the highways is to be interposed between shewing the neglect of those who have the primary right of election, and the appointment by the authority substituted in case of such neglect; and there seems good reason for the interval, as the alleged neglect may be denied or explained, and as inquiry may be requisite to ascertain who are the fittest persons.

The appointment of the surveyors then being invalid, the rate made by them cannot be enforced.

It follows that the rule should be discharged; and if the justices were at the cost of shewing cause, it should be discharged with costs to them.

Rule discharged.

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A RULE had been obtained in Easter Term, calling upon the defendant to shew cause why the judgment of non pros. signed in this cause should not be set aside for irregularity.

It appeared from the affidavit on which the rule nisi was obtained, that this was an action against one of the provisional committee of a Railway Company, to recover the deposit paid upon certain shares by the plaintiff. That the action was commenced on the 1st of August, 1846, and that the defendant entered an appearance on the 11th (a). That on the 14th of August, an order was made in the usual form by the Lord Chief Baron upon the plaintiff to deliver particulars of his demand, and that in the mean time all further proceedings in the cause should be stayed. No particulars were delivered under this order; and on the 24th of February, 1847, the defendant obtained an order from a Judge at Chambers, that the defendant should be at liberty to proceed in this action, notwithstanding the order made herein on the 14th of August, 1846. The plaintiff then took out a summons for time to declare, but the Judge at Chambers refused to make any order. On the 27th of February, the defendant obtained an order from a Judge

The defendant had obtained an order for particulars of plaintiff's demand before declaration, with a stay of proceedings until delivery. After two Terms had elapsed without such delivery, he obtained an order to rescind his former order, and served it, with a demand of declaration within four days. No declaration having been delivered within the four days, he signed judgment of non pros.: *Held*, that the judgment was regular.

(a) Mr. *Lush*, in his book upon *Practice*, p. 336, says, "The defendant must appear by attorney at such a time that his appearance might have relation back to the return of the writ. Accordingly the judgment states the appearance to have been made on the return day. As the appearance must now be dated of the day on which it is entered, and the doctrine of relation is abolished, it would seem, that in order to avail himself of the statute (of non pros.,"

13 Car. 2, st. 2, c. 2, s. 3), "the defendant must cause it to be entered on the eighth day inclusive after service." But in *Archb. Pract.* vol. 2, p. 1279, n. (f), 8th ed., it is said, "It would seem the appearance may be entered after the eight days limited by the writ of summons, unless plaintiff has appeared, sec. stat., in the meantime: *sed quære*," and reference is made to the above quoted passage in Mr. *Lush's* work.

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at Chambers to rescind the former order of the 14th of August, 1846 (a), which he served upon the plaintiff the same day, with a demand of declaration, otherwise judgment of non pros. On the 4th of March, no declaration having been delivered, he signed judgment of non pros. The plaintiff applied to a Judge at Chambers to set aside the judgment, who referred him to the Court, and the above rule was accordingly obtained; against which,

Cowling shewed cause (b). The question is whether, under a rule staying proceedings until delivery of particulars of demand, the time, within which the plaintiff is bound to declare, runs as against the plaintiff; and it is submitted that it does. Undoubtedly, as regards a defendant, the time would not run; but that is only by the express terms of a rule of Court, Reg. Gen., Hil. Term, 2 Wm. 4, pt. I, r. 48, which orders, that "a defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons," &c.; and in no ways affects a plaintiff's liability. The defendant has pursued the proper course in this instance in getting the order for particulars rescinded, and in ruling the plaintiff to declare, and in signing judgment of non pros. on his default. The case of *Kirby v. Snowden* (c) shews, that the defendant could not compel him to deliver the particulars. There the defendant moved for a rule calling upon the plaintiff to shew cause why he should not deliver particulars of his demand within ten days, or, in case of his not so doing, why the defendant should not be at liberty to sign judgment of non pros. The defendant had been served about three months before with a writ of summons, and had immediately taken out a summons for particulars of demand, before the declaration had been delivered. The plaintiff had since been frequently

(a) His Lordship, at the same time, directed that his former order of the 24th of February should be rescinded.
(b) In Easter Term.
(c) 4 Dowl. 191.

required to go on, or to enter a *stet processus*, but he had refused to do either. *Alderson*, B., there says, "this is a novel application, and I think I ought not to establish a precedent of this sort. The practice is, that if the plaintiff does not proceed within twelve months, the cause will be out of Court: if that time is too long, there should be a new rule of Court to alter it. The rule must be refused." His Lordship there obviously contemplates the twelve months counting from the service of the writ of summons, notwithstanding the stay of proceedings during the non-delivery of the particulars.

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Petersdorff, in support of the rule. The stat. 13 Car. 2, stat. 2, c. 2, s. 3, enacts, that unless the plaintiff shall declare "before the end of the Term next following after appearance," the defendant may have judgment of non pros. against him. It is clear therefore, that, supposing no order for delivery of particulars to have been made, the plaintiff had the whole of Michaelmas Term in which to declare. But when that period arrived he could not declare, because a rule had in the mean time been obtained, staying proceedings until the delivery of particulars of demand. It is submitted, that that was a stay of proceedings for all purposes whatever; and that when that rule was rescinded, the plaintiff had the same time within which he was bound to declare as he had at the moment that it was made. And for this reason,—that it would be hard to punish a plaintiff for a delay which the defendant has himself put upon him. The defendant ought to have taken out the summons in the first instance to deliver the particulars within a given time.

Cur. adv. vult.

ERLE, J., now delivered judgment.—In this case the defendant had obtained an order for particulars of plaintiff's demand before declaration, with a stay of proceedings until delivery, and when two Terms had elapsed without any

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delivery, he obtained an order to rescind his former order, and demanded a declaration, and after four days signed judgment of non pros.

The plaintiff has moved to set aside this judgment, contending that he had the same time for declaring after the order rescinding the order for particulars had been obtained, as he had when the order for particulars was obtained. But I am of opinion that the judgment is regular. The non-delivery of particulars by the plaintiff was a default on his part, and his default does not deprive his opponent of any benefit from the lapse of time.

Rule discharged, with costs.

In the matter of HENRY BROOMHEAD, Gent., one, &c.
 and
 In the matter of the QUEEN on the prosecution of THOMAS
 DEWSNAP v. JOHN ALGOR and Others,
 and
 Between HENRY BROOMHEAD, Plaintiff,
 and
 THOMAS DEWSNAP, Defendant.

An attorney has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs.

And the Court will not interfere with that lien, by ordering him to deliver up those papers, on payment

A RULE had been obtained in Easter Term last, calling on an attorney of the name of Henry Broomhead to shew cause why he should not deliver up all the papers in his custody, possession, or power, in anywise relating to the indictment, videlicet, the *Queen v. Algor and Others*, unto Thomas Dewsnap, or to Messrs. Van Sandau and Cumming, his attornies, on his behalf; and why, in the mean time and until delivery up of the said papers, all further proceedings in the action at the suit of the said Henry Broomhead

of the bill of costs in the particular suit: although the bill of costs has been made out and delivered separately; and the client suggests that the possession of the papers is necessary to enable him to carry on the proceedings, and that he will be damaged by the delay.

against the said Thomas Dewsnap should not be stayed ; the said Thomas Dewsnap hereby undertaking either to pay the sum of 99*l.* 12*s.* 11*d.*, being the sum in dispute between the parties, and in respect of which the said Henry Broomhead claims a lien on the papers, or bring the said sum of 99*l.* 12*s.* 11*d.* into Court, or otherwise, as this Court may think proper, (not thereby admitting the right of the said Henry Broomhead to the above-mentioned sum of 99*l.* 12*s.* 11*d.*), either to abide the result of the said action at the suit of the said Henry Broomhead against Thomas Dewsnap, or otherwise, as this Court may think fit.

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There were two affidavits in support of the rule, both made by Mr. Van Sandau, the present attorney of Mr. Thomas Dewsnap, the prosecutor in the above indictment, and the defendant in the above action. The first affidavit shewed that in January last, he had been applied to by Dewsnap to take charge of his interest in the matter of the prosecution, and to tax and adjust the bill of costs of Mr. Broomhead, an attorney, who up to that time had acted as the attorney of Dewsnap in the prosecution, and in other matters. That with that view he entered into a correspondence with Mr. Broomhead and his town agent, Mr. Fiddey, which was set out at length upon the affidavits; the purport of which was, that unless Mr. Broomhead would assent to a change of the attornies in the prosecution, and deliver up all the papers connected with it, and consent to a considerable reduction of his bills, that Mr. Van Sandau would apply to have the bills taxed, the papers delivered up, and should hold himself justified in pleading the statute of limitations, and negligence to any action Mr. Broomhead might bring to recover the amount of his bills. That Mr. Broomhead rejected these terms, and commenced an action. That Van Sandau took out three summonses before a Judge at Chambers, and obtained the three following orders; one for the taxation of the bills of the said Henry Broomhead, which had then already been delivered, but without prejudice to any objection or question of liability; another

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appointing Van Sandau and his partner, attornies in the matter of the prosecution, instead of Henry Broomhead; and the third, that Broomhead should, within ten days, deliver a bill of costs in all causes and matters wherein he had been concerned for the said Thomas Dewsnap, but if the papers in the prosecution should be delivered over, then that Broomhead should have a month's time for the delivery of his bill of costs. That some further correspondence took place between the parties, in the course of which an offer was made on the part of Dewsnap to pay a sum of money, but considerably less than the amount claimed, upon account, but under protest; which, however, was not accepted on the part of Broomhead. Broomhead then delivered a further signed bill of costs in the matter of the prosecution, and another summons was taken out and order for taxation made by Mr. Justice *Coleridge* in the usual form, containing the usual clause that "upon payment by the said Mr. Dewsnap of what (if any thing) may appear to be due to the said Mr. Broomhead, the said Mr Broomhead do deliver up to the said Mr. Dewsnap, or to his attorney, all deeds, books, papers, and writings in his possession, custody, or power, belonging to the said Mr. Dewsnap." That the costs were accordingly taxed by the Master, who, on the 20th of March, gave his allocatur for the costs under the first order at 269*l.* 12*s.* 11*d.*, and for the costs under the second order at 89*l.* 10*s.* 6*d.* These allocaturs were served on the London agents of Mr. Broomhead on the 13th of February, and the sum of 89*l.* 10*s.* 6*d.* tendered, and the papers in the prosecution demanded, and an offer of payment of 170*l.* more, and costs of the writ, if accepted in satisfaction of the action. The London agents refused to receive these sums in satisfaction, or to give up the papers; and informed the party serving them that they had issued process for the amount of both allocaturs, and that they withdrew the former writ. That on the 25th day of March, Van Sandau took out a summons, calling on Broomhead to shew cause why, without prejudice to the rights of the parties under the

order of Mr. Justice *Coleridge*, of 13th of February last, upon payment of 170*l*., and also the sum of 89*l*. 10*s*. 6*d*., being the amount of the Master's allocatur under the said order, making together the sum of 259*l*. 2*s*. 6*d*., together with costs to be taxed, all further proceedings in that cause should not be stayed. That the summons was afterwards in due course attended before Mr. Justice *Erle*, and was indorsed by the plaintiff's town agent, "I refuse to accept as within." The affidavit then stated a demand of the papers and a tender of 89*l*. 10*s*. 6*d*., at the office of Mr. Broomhead, in the country; and concluded with an averment that deponent believed that the object of refusing to give up these papers was to force Dewsnap to pay the gross amount of the allocaturs, to which, it was alleged, he was not legally liable; and not with a legitimate view to the security of Broomhead, inasmuch as Dewsnap was a person of large property. The second affidavit also was made by Mr. Van Sandau, and stated that on the foregoing affidavit, on the 10th of April he attended on a summons before Mr. Justice *Erle* at Chambers, calling on Henry Broomhead to shew cause why, on payment of 89*l*. 10*s*. 6*d*., the amount of the Master's allocatur under the Judge's order of the 13th of February, he should not deliver up to Messrs. Van Sandau and Cumming, as the attornies of the defendant, the deeds, papers, and writings, in such order mentioned or referred to; and why he should not pay the costs of the application; the defendant thereby offering and undertaking to submit to such (if any) order as the sitting Judge at Chambers might make for any further or other payment into Court by way of security, but not recognizing any liability for any larger sum than the said 89*l*. 10*s*. 6*d*., and 170*l*., and the costs of the writ, at the suit of the plaintiff. That the case was gone partly into, when Mr. Justice *Erle* proposed to take the affidavit and read it over, and give his opinion the following day. That on the 12th, that learned Judge indorsed the summons "No order; I find no authority or principle for an order out of the usual course." That the defendant then

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pleaded three pleas to the action at suit of Broomhead. First. Except as to 259*l.* 10*s.* 6*d.*, parcel, &c., never indebted. Secondly. Except as to 259*l.* 10*s.* 6*d.*, parcel, &c., statute of limitations; and as to 259*l.* 10*s.* 6*d.* payment into Court. Mr. Van Sandau then, on behalf of the defendant, offered to pay into Court, or deposit in the hands of Mr. Broomhead's London agent the amount in dispute, provided the papers were given up to the defendant, he undertaking to produce any of them at the trial of the action, and to give reasonable access to them in the mean time. The plaintiff made up the issue and served it with notice of trial, refusing to give up his lien, or to accede to any terms less than the full amount of his claim, after such grounds of defence taken, and after the opinions of Mr. Justice *Erle*, and of Mr. Justice *Coleridge*, had been given against the defendant. It appeared that a summons had been taken out on the 11th of February, calling on Mr. Broomhead to shew cause why, upon payment, under protest, and subject to future taxation, and the refunding of what may be overpaid in respect thereof of the amount of Mr. Broomhead's bill of costs of this prosecution, amounting to 99*l.* 7*s.* 11*d.*, he should not forthwith deliver to Messrs. Van Sandau and Cumming, the now attornies of the prosecutor, all the papers relating to this prosecution, Messrs. Van Sandau and Cumming undertaking to produce all or any of the said papers which may be required on the taxation of the costs, or relating to this prosecution; and that the order was refused by Mr. J. *Coleridge*. That deponent states as evidence that Dewsnap has been and is likely to be damnified by the retention of the papers, that the said indictment is for non-payment of the costs of a certain appeal which the said Thomas Dewsnap prosecuted against the board for the repair of highways in the township of Ecclesall Bierlow, in the parish of Sheffield, in the West Riding of Yorkshire, which costs, amounting to 77*l.* 5*s.* 4*d.*, the said board were, by the order of the Quarter Sessions, ordered, but have refused or neglected to pay unto the said Thos. Dewsnap,

and which costs and other charges to a large amount in respect of that appeal, together with 89*l.* 10*s.* 6*d.* for the costs hitherto of the said indictment, formed part of the sum paid into Court by the said Thos. Dewsnap in the said action against him of the said H. Broomhead, who was his attorney in the said appeal and indictment. That at the trial a special verdict was taken, which was not yet drawn up, and could not be proceeded with until the papers were given up.

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The affidavits in answer to this rule were made by Mr. Broomhead, his son, and the managing clerk of his London agent. They did not in any respect materially alter the facts as above stated. They shewed that before the above proceedings Mr. Dewsnap had several times promised to pay Broomhead these costs. They denied any intention on the part of Broomhead to injure or aggrieve Mr. Dewsnap in the conduct of the prosecution of the indictment (a proof of which was given by a letter of Broomhead set out in the affidavits in support of the rule, in which he offered to go on with the indictment for Mr. Dewsnap notwithstanding, rather than that he should be delayed), and shewed that he merely stood upon his rights as an attorney to detain the papers over which he had a lien, until his bills of costs were paid.

Sir *F. Thesiger* and *F. Robinson* now shewed cause. This is an unprecedented application, and one which, it is submitted, the Court will not grant. Here the attorney has been engaged for the client in various matters, amongst the rest, in the conduct of a prosecution; and the attorney's bills having been taxed, the client now asks, upon payment of one of the bills which contains the costs of the prosecution only, to have the papers relating thereto, and upon which the attorney has a lien, not only for these costs, but for his general costs, delivered up to him. The rule is, that an attorney has a lien on the papers in his custody for his general costs. This is an attempt to restrict it to the

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costs of that proceeding to which the papers in question relate. Here the bills have been taxed, and the amount ascertained by the Master's allocatur. It is only, therefore, upon payment of the whole amount found by the Master's allocatur, and not a mere payment of a part, that the client becomes entitled to have his papers delivered up. But even supposing for an instant that the Court would interfere in a matter of this kind, when vexatious or improper conduct on the part of the attorney appeared; this is not such a case; on the contrary, it is a case in which the attorney will be unjustly deprived of a portion of his demand by the defence which has been set up of the Statute of Limitations, if this motion be acceded to. In *Higgins v. Scott* (a), it was held, that the Statute of Limitations bars the remedy only, and not the debt, and that, therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a fi. fa. issued against his goods, upon which the sheriff levied the damages and costs; it was held, that the attorney, though he had taken no steps in the cause, or to recover the amount of his bill of costs, within six years, had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods.

Watson and *Cleasby* in support of the rule. It would be extremely hard if, after a client has become dissatisfied with his attorney and desires to change him, he should be compelled to pay him his demand, however unjust, or else be unable to obtain the papers which are necessary to carry on any suits in progress of litigation. [*Wightman*, J.—Have you any authority for an application like the present?] There is no case in which this point has been expressly decided; but it is submitted that the Court in its discretionary power will take care that the lien of the attorney

(a) 2 B. & Ad. 413.

does not act as a prejudice to the client by forcing him to pay an unjust demand. [*Wightman*, J.—The Court will see that the attorney is not unjustly deprived of the benefit of his lien.] The client here is obliged to go on with the prosecution. It therefore coerces him to pay a demand, which he says is unjust. [*Wightman*, J.—Supposing that this were the case of ordinary parties between whom the relation of attorney and client did not exist, could you compel the party to give up his lien, on offering him a less sum than he says is due to him?] No; but here the attorney is an officer of the Court, and has received the papers in that capacity.

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WIGHTMAN, J.—This is undoubtedly a case of the first impression, and is the same point as was before my Brother *Erle* at Chambers, who refused the application. The question really simply is, whether this Court will deprive an attorney of his lien over the papers of his client, by substituting some other security in its place. I confess, it seems to me, that this cannot be done. It is said, that the Court will act differently in a case of lien between attorney and client, than between ordinary parties. The attorney, it is said, receives the papers in his official capacity; but one of the main incidents to his so receiving them, it must be borne in mind, is, that he may detain them till his costs are paid. This motion is contrary to principle and without precedent; and the rule must, consequently, be discharged.

Rule discharged.

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Where little more than a twelvemonth had elapsed since the admission of an attorney, the Court, under special circumstances, allowed him to take out a certificate, without giving the notices required by Reg. Gen., Easter Term, 9 Vict.

See post, 294.

Ex parte THOMAS WYSE WEYMOUTH, Gent., one, &c.

THIS was an application to permit an attorney to take out his certificate, notwithstanding that he had not given the notices required by Reg. Gen., Easter Term, 9 Vict. (a), under the following circumstances.

There were affidavits made by the applicant and his father, which shewed that the applicant had been admitted an attorney of this Court, 4th of May, 1846, having previously been employed under articles of clerkship to his father, one of the attorneys of this Court, as his clerk. That shortly after his admission, on the 6th of July, he engaged himself to his father, and was employed by him from that time down to the period of the present application, as an assistant in his practice and business as an attorney. That he had never yet taken out a certificate or practised as an attorney. That a district County Court had been appointed for the recovery of small debts at Kingsbridge, in the county of Devon, where his father carried on his business as an attorney, pursuant to 8 & 9 Vict. c. 127. That the applicant's father, by reason of his other engagements, was unable to attend personally in that Court, and that the Judge of the Court had, in common with several other Judges of County Courts, decided to allow no one to practise in his Court, except he were a barrister or regularly admitted attorney, who had taken out a stamped certificate; and that he had appointed a roll which attorneys practising in his Court were to sign. That until the applicant and his father had heard of this decision, it was arranged and intended that the applicant should assist his father, by conducting such suits in the County Court. That the applicant "did not hear of such decisions as aforesaid in sufficient time to be able, three days at least previous to the first day of this present Trinity

(a) *Ante*, vol. 3, p. 840.

Term, 1847, to give the notices required by the rule of Court respecting attorneys' certificate made in Easter Term, 1846," to ground an application for his certificate. That in consequence of his having failed to give the requisite notices he is precluded until the end of next Michaelmas Term, which is several months hence, from making such application, and procuring such stamped certificate as aforesaid, if compliance with Reg. Gen., Easter Term, 1846, be strictly enforced in the case of this deponent, and he will be prevented from practising in said district County Court, and will be thereby greatly injured in his professional welfare and success.

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The affidavit by the father stated that he was admitted an attorney in 1808, and had practised for several years past at Kingsbridge. It confirmed in all respects the affidavit of the son, and stated the serious inconvenience and injury which it would be to him if his son could not obtain his certificate before Michaelmas Term next, and that he would be compelled to decline conducting any cases in the County Court.

H. T. Cole now moved accordingly (a).

WIGHTMAN, J., after expressing some doubt on the subject, was of opinion that as the twelvemonths, within which the applicant might have taken out his certificate without any notices at all, had only just elapsed, the present was a case in which, under the peculiar circumstances stated, the compliance with the Reg. Gen., Easter Term, 9 Vict., might be dispensed with.

Rule accordingly (b).

(a) On the 7th of June.

✓ (b) See *Ex parte Webb*, ante, vol. 4, p. 641.

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LANDELLS v. BALL.

Where a rule for judgment as in case of a nonsuit has been discharged upon the plaintiff's giving a peremptory undertaking, and the plaintiff never draws up the rule, or fulfils his undertaking, it is not necessary in this Court, in order to entitle the defendant to judgment absolute as in case of a nonsuit, that he should draw up and serve the rule within the time limited by the peremptory undertaking.

6. D. & C. 260

THIS was a rule to rescind a rule for judgment as in case of a nonsuit, for not proceeding to trial, pursuant to a peremptory undertaking; and to set aside the judgment which had been signed thereon, with costs.

It appeared that issue had been joined in this cause on the 22nd of May, 1846, and notice of trial given for the 26th. That the notice of trial was afterwards continued to the sittings after Term, and countermanded on the 6th of June. On the 21st of January, 1847, a rule nisi for judgment, as in case of a nonsuit, was served on the plaintiff's attorney; and on the last day of Hilary Term, was discharged on the plaintiff entering into a peremptory undertaking to try at the first sittings in Easter Term. The plaintiff never drew up the rule for a peremptory undertaking, but on the 15th of February the defendant drew up the rule, and served it on the plaintiff on the 10th of April, too late, however, for the plaintiff to give notice of trial for the first sittings in Easter Term. The plaintiff never proceeded to trial pursuant to his undertaking, and on the last day of Easter Term, the defendant obtained a rule for judgment, as in case of a nonsuit for not proceeding to trial, pursuant to his peremptory undertaking, and judgment having been signed on it, the present rule was thereupon obtained.

Worledge shewed cause. The plaintiff will, no doubt, rely upon the cases of *Gingell v. Bean* (a), and *Knight v. Smith* (b), in the Court of Common Pleas, as shewing that where the plaintiff had taken no step to draw up the rule discharging the rule for judgment as in case of a nonsuit on his giving a peremptory undertaking, the defendant, if he

✓(a) 1 M. & G. 50; S. C. 1 Scott, Scott, N. R. 896; *Ante*, vol. 1, N. R. 153. p. 912.

✓(b) 6 M. & G. 1016; S. C. 7

seeks to avail himself of the rule, must draw it up, and serve it within the time to which it relates. But the question is, how far the decisions in that Court as to its practice, supposing them to be correct (*a*), are to bind this Court, which has certainly never pursued a similar course? The Court of Common Pleas, in the cases cited, say that the practice appears to them to be only reasonable, that where the rule is not drawn up, it is to be taken as abandoned. But it is submitted, that it would be a more reasonable practice to say that, where the plaintiff has not given the peremptory undertaking on which the rule was to be discharged, the rule for judgment as in case of a nonsuit, has become absolute. There would be many inconveniences attending such a practice as the one contended for. Would the defendant have to wait till the last minute of the last day in order to draw up the rule? The practice in this Court is clearly the other way. And it has never been held necessary for the defendant to draw up and serve the rule within the time limited by the peremptory undertaking, in order to enable him to come to the Court for a rule absolute for judgment as in case of a nonsuit, where the plaintiff did not proceed to trial pursuant to his peremptory undertaking. The form of the affidavit in such cases shews this, for it says nothing about the rule having been served.

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The Court called on

Brammoell to support the rule. The practice upon this subject has been settled by the Court of Common Pleas in *Gingell v. Bean* (*b*), and *Knight v. Smith* (*c*), and by the Court of Exchequer in *Sawyer v. Thompson* (*d*). In the latter case, the case of *Gingell v. Bean* was referred to; and *Alderson, B.*, in giving judgment, says, "That case is in

✓ (*a*) See *Gingell v. Bean*, 1 M. & G. 555; S. C. 1 Scott, N. R. 390.
 . (*b*) 1 M. & G. 50; S. C. 1 Scott, N. R. 153.

✓ (*c*) *Ante*, vol. 1, p. 912; S. C. 6 M. & G. 1016; 7 Scott, N. R. 896.
 (*d*) 9 M. & W. 248; S. C. 1 Dowl. 449, N. S.

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point, and it is consistent with common sense, that if the defendant means to act upon the undertaking, he should give the plaintiff notice in time that he does so." If no rule be drawn up, where is the peremptory undertaking, upon which this rule for judgment as in case of a nonsuit, is founded?

WIGHTMAN, J.—It is desirable that all the Courts should agree upon the practice, as it is only a matter of practice.

Cur. adv. vult.

WIGHTMAN, J.—This was a motion to set aside a rule for judgment as in case of a nonsuit, which had been obtained for not proceeding to trial pursuant to a peremptory undertaking; and the question was, whether the plaintiff was bound to take notice of the rule discharging the rule for a nonsuit on a peremptory undertaking, and to draw it up; or whether, if he did not, and the defendant sought to avail himself of it, the defendant must not draw it up, and serve it within the time limited by the peremptory undertaking. Now, the Master informs me, that according to the practice in this Court, when a rule for judgment as in case of a nonsuit, is discharged upon an undertaking by the plaintiff to try within a given time, it is the duty of the plaintiff to draw up the rule containing the undertaking; and it appears to me reasonable that it should be so. No doubt, indeed, would have existed in my mind upon this subject, but for the cases which have been cited as decided by the Courts of Common Pleas and Exchequer.

The first case was that of *Gingell v. Bean* (a), in the Court of Common Pleas, which was followed by *Sawyer v. Thompson* (b), in the Exchequer, where Mr. Baron Alderson, sitting alone, on the authority of the first-mentioned case, decided, that where a rule is discharged upon a peremptory

(a) 1 M. & G. 50; S. C. 1 Scott, N. R. 153.

(b) 9 M. & W. 248; S. C. 1 Dowl. 449, N. S.

undertaking, the defendant is bound to draw it up, and serve it within the time limited by the peremptory undertaking, if he wishes to avail himself of it. It seems that the practice in the Common Pleas had been for the defendant, if he wished to avail himself of it, to do so (a); but what the practice was in the Exchequer does not appear.

In the absence of any universal practice, it does not seem to me that there is anything erroneous in the practice in this Court. On the contrary, it seems to me to be a reasonable practice that the party who has procured the rule to be discharged on his undertaking to do a certain act, should be bound by that undertaking without its being necessary to serve him with a copy of the rule formally drawn up.

The judgment, therefore, must stand, and the rule will be discharged, but, as the plaintiff may have been misled by the cases on the subject, without costs.

Rule discharged (b).

(a) *Gingell v. Bean*, 1 M. & G. 50; but see S. C. *ibid.* p. 555.

(b) The practice in this Court, it is understood, is to consider the rule for discharging the rule for judgment as in case of a non-suit upon a peremptory undertaking, where no costs of the day have been incurred, as the plaintiff's rule; and if the defendant goes to the Rule Office to draw it up, he is told that it is so considered; but that in the event of the plaintiff not drawing it up, nor performing his undertaking, it will be given to him.

In the event of costs of the day being blended in the same rule, either party may draw it up; but where none are included, neither party is bound to serve the rule.

In the Common Pleas, it is

considered as either party's rule, and delivered to either the plaintiff or the defendant, whichever first applies for it. The same practice prevails, it is understood, in the Court of Exchequer. There is now (Easter Term, 1848), pending in the latter Court, a case of *Collingridge v. Evans and Others*, in which a rule has been obtained to discharge a judgment absolute for not proceeding to trial pursuant to a peremptory undertaking, in which it is probable that the authorities on this subject will again be brought under the notice of the Court. (The rule came on for argument on the last day but one of Easter Term, and the case now stands for judgment, 30th May, 1848.)

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SPENCER and Another v. HAGGLADUR.

On writ of error on a judgment in an inferior Court, where the execution has been levied before the allowance of the writ, but not paid over till after, this Court has no power to order the sum levied to be paid into Court, to abide the result of the writ of error.

A RULE had been obtained in Easter Term last, calling upon the defendant in error in this cause, and the serjeant-at-mace of the Borough Court of Kingston-upon-Hull, to shew cause why they should not repay to the plaintiff in error the damages and costs levied under the fieri facias issued out of the Court of Record of the Borough of Kingston-upon-Hull; or why the said damages and costs should not forthwith be paid into Court, to abide the result of the writ of error sued out herein.

It appeared that the defendant in error had obtained a judgment in an action against the plaintiffs in error, in the Borough Court of Kingston-upon-Hull, and had sued out a writ of fieri facias, under which the goods of the plaintiffs in error had been seized. That after the seizure and before the sale the present writ of error was sued out, but that the allowance of it was not till after the sale. The proceeds, however, of the sale were paid over by the officer to the plaintiff in the Court below, after the allowance of the writ of error.

W. H. Watson, on behalf of the defendant in error, now shewed cause. This Court has no jurisdiction in a case like the present. The application should be made to the Court below. If the officer execute the writ after notice of allowance of a writ of error, he is liable to an action of trespass(a); but this Court cannot interfere with an execution issuing out of the Court below.

The Court called upon

Dearsley to support the rule. It is submitted that on allowance of a writ of error, all further proceedings are stayed in the action, and, if execution has issued, and is

/(a) See *Belshaw v. Marshall*, 4 B. & Ad. 336; S. C. 1 N. & M. 659.

partly executed, the money should be paid into the Court out of which the writ of error issues. [*Wightman*, J.—What authority is there for that proposition?] It is so laid down in 1 *Chit. Arch. Pr.* p. 360, 7th ed., that “after the sheriff has partly executed the writ, he must proceed in the execution, notwithstanding a writ of error; as, where the sheriff had seized, under a fieri facias, and then a writ of error was brought and allowed, the Court held that he should sell the goods, and pay the money into Court, to abide the event of the writ of error.” [*Wightman*, J.—That must mean the Court below; what authority is given?] The reference is to *Meriton v. Stevens* (a), and it is also said, “see *Doe d. Messiter v. Dyneley*” (b); but, upon referring to those cases, it must be confessed that they do not bear out the construction which the plaintiffs in error have put upon the passage in Mr. Chitty’s work.

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Montagu Smith appeared for the serjeant-at-mace, but was not called upon.

WIGHTMAN, J.—It seems to me that I have no power to interfere with the execution in the Court below, or to order its officer to pay over the money levied. All that I have power over is the record which is removed by writ of error.

Rule discharged, with costs.

✓(a) *Willes*, 271; See also n. (2) 101 f, 101, 1, 6th ed.
to *Jaques v. Caesar*, 2 Wms. Saund. ✓(b) 4 Taunt. 289.

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SAME v. SAME.

A writ of error was directed to M. T. B. Esq., "*Recorder of the Court of record of and for the borough of K.*" The return was made by M. T. B., Esq., "*Judge of the Court of record of the borough of K.*" It appeared that the Court of record of the borough of K. was an ancient Court of record, and that the recorder acted as Judge, under the

✓ 5 & 6 Wm. 4, c. 76, s. 118. On motion to quash the writ of error for irregularity, the Court allowed the plaintiffs to amend the writ of error by inserting the word "*Judge*" instead of "*Recorder.*"

Where the declaration contained two counts, one of which was bad; and the verdict in the Court below was taken generally for the plaintiffs: *Held*, that this Court had no

THIS was a rule calling upon the plaintiffs in error in this cause to shew cause why the writ of error sued out herein should not be quashed for irregularity, with costs: and why, in case the same be not quashed, the record and proceedings in the Court of Record of Kingston-upon-Hull, and the transcript thereof, should not be amended, without costs, by confining the verdict to the second count only; and why that count should not be amended, by shewing that the cause of action therein set forth arose within the jurisdiction of the inferior Court.

It appeared that the writ of error in this case was directed to "Matthew Talbot Baines, Esq., *Recorder of the Court of Record of and for the Borough of Kingston-upon-Hull,*" and recited that "forasmuch as in the record and proceedings, and also in giving judgment in a plaint which was before you in our Court of record, of and for the borough of Kingston-upon-Hull, between Lucca Haggiadur and Abraham Spencer, and Charles Smith, in an action of promises, manifest error hath intervened," &c.; and commanded him to send under his seal the record and proceedings, &c. To which writ a return had been made in the following form:—"The answer of Matthew Talbot Baines, Esq., *Judge of the Court of Record of the Borough of Kingston-upon-Hull.* The record and proceedings of the plaint whereof mention is within made, with all things concerning the same, I hereby certify, as within I am commanded, in a certain schedule to this writ annexed; M. T. Baines, *Judge of the said Court.*" The schedule was as follows:—"Borough of Kingston-upon-Hull and county of the same town. I, Matthew Talbot Baines, Esq., *Judge of the Court of Record of the said borough of Kingston-upon-Hull,* do most solemnly certify to our lady the Queen as follows:—

power, after error brought, to amend the verdict, by confining it to the sufficient count.

Borough of Kingston-upon-Hull, to wit. At the Court of Record," &c. (here the record was set out.) It also appeared that the Court of Record of Kingston-upon-Hull was an ancient Court of record by charter, and although the recorder acts as Judge in it, under 5 & 6 Wm. 4, c. 76, s. 118, he does not sit there as recorder, but as Judge of the borough Court. The declaration, which was in assumpsit, contained two counts, besides a count upon an account stated, the first of which was a special count for not properly repairing a vessel, and the second was for money had and received. The error assigned was, that the second count did not shew that the cause of action arose within the jurisdiction, it being stated simply as "money then had and received," the word "there" being omitted. An application to amend had been made to the recorder, who had declined to interfere.

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Dearsley shewed cause. The objection to the writ of error is, that it is improperly directed, and that it should have been directed to the *Judge* of the Court of Record of Kingston-upon-Hull, eo nomine. But it is submitted that it is sufficient, in being directed "to Matthew Thomas Baines, Esq.," who, it is not disputed, is the Judge of that Court, as well as Recorder. Besides, even if the objection were a good one, it is taken too late, after the return has been made to the writ of error. It appears certified on the record, that Mr. Baines is the Judge of the Court of Record. At any rate, if the objection were a valid one, this Court would amend the writ in that respect.

As to that part of the rule which asks to amend the verdict, it is submitted that the Court has no power to do that. There is nothing to amend by. Even in the case of a verdict at nisi prius, this Court, sitting in banc, has no power to amend it. The Judge before whom the cause is tried is the only person who can do so (a), and he only to

(a) See per *Coleridge, J.*, in *Doe d. Hazby v. Preston*, ante, p. 8.

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a certain extent. Here it is sought to confine the verdict to the second count, which is clearly bad; *Trevor v. Wall* (a); and then to amend that count.

W. H. Watson, in support of the rule. The direction of the writ of error is to Mr. Baines, as *Recorder* of Kingston-upon-Hull, and he certifies as "*Judge* of the Borough Court of Record." There is a variance, therefore, between the return and the direction of the writ; and another officer, than the one to whom it is addressed, seems to have returned it. In the character of "*Recorder*" he has no control whatever over the record in this action. He referred to *Spry v. Mill* (b); *Gay v. Adams* (c); *Walker v. Stokoe* (d); *Gibbons v. Saunders* (e). [*Wightman, J.*—Are you aware of the 5 Geo. 1, c. 13, s. 1, which authorizes the Court out of which the writ of error issues to amend it] (f). That statute only refers to amendments where there is a variance between the writ and record. [*Wightman, J.*—It says, "any variance from the original record, or other defect."] It only empowers the Court to cause it to be "amended and made agreeable to such record."

As to the amendment sought to be made in the verdict in the Court below, it is only a misprision of the clerk in entering the verdict. If the Court below had amended it, as, it is submitted, they ought, this Court would not have interfered with their amendment (g); but they have refused to do so, and, therefore, the only course open to the defendant in error is to come to this Court. In *Usher v. Dansey* (h), where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for

✓(a) 1 T. R. 151.

(b) *Styles*, 203.

(c) 2 Saund. 291 e, 292; S. C. 2 Keb. 746; 1 Vent. 109.

✓(d) 1 Ld. Raym. 151; S. C. Carth. 367; 5 Mod. 16, 69; Comb. 354.

✓(e) 2 Ld. Raym. 819.

(f) See n. (1) to *Jacques v. Cesar*, 2 Wms. Saund. 101, 101 (a), 6th ed.

✓(g) See *Salter v. Slade*, 1 A. & E. 608; S. C. 3 N. & M. 717; and *France v. Parry*, 1 A. & E. 615. ✓

✓(h) 4 M. & S. 94.

the same, and writ of error upon the judgment, assigning that for cause; the Court allowed the plaintiffs to amend the judgment and transcript in a Term subsequent to that in which the judgment was signed, by entering a remittitur for the excess.

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WIGHTMAN, J.—As to the first point, I think that the writ is improperly directed, but that I have power to allow the plaintiffs in error to amend it, and shall accordingly do so.

As to the second point, without pronouncing whether I could amend the second count by the insertion of the words proposed, I am of opinion that I have no power to alter the verdict by confining it to that count. The entering a remittitur damna is a very different case.

The rule will, therefore, be discharged, but as the plaintiffs in error have been obliged to amend, without costs.

Rule discharged, without costs.

WARBURG and Others v. READ.

THIS was a rule calling upon the plaintiffs to shew cause why the execution signed herein should not be set aside, and why they should not bring into Court and file the plea-roll, so that the defendant might enter a suggestion thereon, that the debt recovered in the action did not amount to 5*L*, and that the defendant, at the time of the commencement of the action, was an inhabitant of, and resident at, Newport, in the Isle of Wight, in the county of Southampton, and liable to be summoned to the Isle of Wight Court of

The Isle of Wight Court of Requests' Act (46 Geo. 3, c. lxvii. s. 40) enacts, that "if any action" "for any debt recoverable by virtue of this act in the said Court of requests, shall be commenced in any other Court, the

plaintiff "in such action," &c., "shall not, by reason of a verdict for him," &c., "or otherwise, have or be entitled to any costs whatsoever." A writ of summons was sued out in this Court on the 1st of December, 1846, for a debt recoverable in the Court of Requests, but was not served till the 28th of March, and judgment by default signed on the 20th of April following. (On the 22nd of March, a County Court was substituted for the Court of Requests, under the 9 & 10 Vict. c. 95: *Held*, on motion to enter a suggestion to deprive the plaintiffs of costs, under the Court of Requests' Act, that that act was not repealed by the 9 & 10 Vict. c. 95, s. 5, so far as related to the depriving the plaintiffs of costs.

Held also, that the motion was not too late, although judgment by default had been signed in an action of debt, and execution issued.

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Requests, pursuant to the statute in that case made and provided.

The following facts appeared upon the affidavits. The writ of summons in the above action was sued out on the 1st of December, 1846, and served on the defendant on the 28th of March, 1847. The amount indorsed on the writ was 3*l.* 6*s.* debt. On the following day, the defendant gave the plaintiffs notice that he was resident within the jurisdiction of the Isle of Wight Court of Requests. On the 10th of April, notice of declaration was given. Within a day or two afterwards the defendant sent to the plaintiffs the amount of the debt, of which the plaintiffs acknowledged the receipt, but claimed a further sum of 4*l.* 10*s.* for costs. This further sum not being paid, the plaintiffs, on the 20th of April, signed judgment by default, and on the 1st of May issued a fieri facias, indorsed to levy 6*l.* 17*s.* On the 3rd of May, the sheriff seized the goods of the defendant, and on the 12th, a sale was effected. By the Isle of Wight Court of Requests' Act, 46 Geo. 3, c. lxvi, s. 40 (a), it is enacted, that if any action shall be brought in a superior Court for a debt recoverable in the Court of Requests established by that act, "the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever," &c. On the 22nd of March, 1847, a County Court, constituted under the 9 & 10 Vict. c. 95, for the Isle of Wight district, was

(a) 46 Geo. 3, c. lxvi. s. 40, enacts, "That if any action or suit for any debt recoverable by virtue of this act in the said Court of Requests, shall be commenced in any other Court," &c., "then and in every such case the plaintiff or plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever, and if the verdict shall be given for the defendant or defendants in such

action or suit, and the Judge or Judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said Court of Requests then and in every such case such defendant or defendants shall have costs, and such remedy for recovering the same as any defendant or defendants may have for his, her, or their costs in any cases by law."

opened pursuant to the provisions of that statute. On the 27th of May, the above rule was obtained, against which

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Bramwell shewed cause. It is submitted, first, that the application in this case is made too late; secondly, that the present case is not within the 40th section of the Isle of Wight Court of Requests' Act; and, thirdly, that even if it were, that act has been repealed by the County Courts' Act. As to the first point, it is laid down in *Tidd's Prac.*, p. 961, 9th ed., "The application for leave to enter a suggestion should be made promptly: and, therefore, where a motion for obtaining such leave might have been made in Easter Term, but instead of that, a negotiation respecting the costs was then entered into, and the motion was made in Trinity Term, the Court held that it was too late. The application for such leave must be made before final judgment signed." The case of *Calvert v. Everard* (a) is an authority that after final judgment, a defendant is too late to apply to the Court under a Court of Requests' Act, in order to deprive the plaintiff of costs. [*Wightman, J.*—There is a case of *Burbidge v. Marvin* (b), where the Court of Exchequer held that an application to deprive a plaintiff of costs under this very Court of Requests' Act, might be made after judgment by default in an action of debt.] At any rate, the defendant ought not to be guilty of an unnecessary delay in making the application. In *Hippesley v. Layng* (c), it was held, that a party entitled to enter a suggestion for the purpose of depriving the plaintiff of his costs, under a Court of Requests' Act, must apply promptly, and that it was not even sufficient that he should apply before final judgment is signed. In that case, the defendant might have applied in Easter Term for such a purpose, but suffered all that Term to elapse, and did not apply till Trinity Term; and it was held, that he came too late, though the delay occurred

(a) 5 M. & S. 510.

(c) 4 B. & C. 863; S. C. 7 D.

(b) *Ante*, vol. 1, p. 605; S. C. & R. 265.

12 M. & W. 8. ✓

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through a negotiation having taken place respecting the costs. In *Heale v. Erle* (a), the defendant applied at the very earliest opportunity. As to the second point, it is submitted, that section 40 of the Isle of Wight Court of Requests' Act only applies to a case where there has been a trial and a verdict of a jury. The words of the section are remarkable; "that if any action," &c., "for any debt recoverable by virtue of this act in the said Court of Requests, shall be commenced in any other Court, the plaintiff," &c., "in such action," &c., "shall not by reason of a verdict for him," &c., "or otherwise, have or be entitled to any costs whatsoever." The act, therefore, only contemplates the case where a trial is had, and a verdict obtained. [*Wightman, J.*—The words "or otherwise," would seem to include in whatever other way he might be entitled to costs.] The first part of this section, and the second, which gives costs to a defendant in case the plaintiff does not succeed (b), must be read together; and the latter is clearly restricted to cases "where the verdict shall be given for the defendant." [*Wightman, J.*—I find the same point was taken in the case of *Burbidge v. Marvin* (c), but without success.] With respect to the third point, the 9 & 10 Vict. c. 95, s. 5, enacts, "that it shall be lawful for her Majesty, with the advice of her privy council, to order that any Court holden for the recovery of small debts or demands within the provisions of any act cited in either of the schedules annexed to this act, and marked (A) and (B) respectively," (the Isle of Wight Court of Requests' Act being cited in schedule (A)), "shall be holden as a County Court;" "and every such Court shall continue to be holden under the act according to which it is now constituted or regulated until the time mentioned in any such order, which shall be made with

✓(a) 2 M. & W. 383; S. C. *nom. div.* 5 Dowl. 595. ✓

(b) It was observed in the course of the argument, that the word "double" before "costs,"

had doubtless been omitted, in the latter part of the section.

✓(c) *Ante*, vol. 1, p. 605; S. C. 12 M. & W. 8.

reference to such Court; and from and after the time mentioned in any such order the act or acts under which such Court is now constituted, so far as the same relate to the establishment or jurisdiction or practice of a Court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act thereby repealed," &c. Section 6 enacts, that when a Court shall be established as a County Court under this act, all former acts affecting its jurisdiction shall be repealed. And section 7 enacts, "that all proceedings in execution of the said acts or any of them commenced before the passing of this act, or before the days severally appointed for the alteration of the constitution of the said Courts, shall be as valid to all intents and purposes as if this act had not been passed, or as if the said Courts had not been altered, and may be continued, executed, and enforced against all persons liable thereto in the same manner as if they had been commenced under the authority of this act." It is submitted that as the Isle of Wight Court of Requests' Act was wholly repealed on the 22nd of April last, except so far as is provided by the 7th section, the present application cannot be considered within the provisions of that section. In *Charrington v. Meatheringham and Another (a)*, the 5 & 6 Wm. 4, c. 50, having repealed the 13 Geo. 3, c. 78, which gave treble costs to parties sued for anything done in pursuance of the act, on a nonsuit; a plaintiff who sued parish officers for an act done under the 13 Geo. 3, c. 78, became nonsuit at a trial which took place before the 5 & 6 Wm. 4, c. 50, came into operation, but judgment was not signed till after. And it was held, that the defendants were not entitled to treble costs. In *Warne v. Beresford (b)*, the defendant pleaded to an action for goods sold, a Court of Requests' Act, within the jurisdiction of which Court he was resident. After plea pleaded, and before trial, the Court of Requests' Act was repealed, and it was held that the plaintiff was entitled to judgment non

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(a) 2 M. & W. 228; S. C. 5 Dowl. 464.

(b) 2 M. & W. 848.

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obstante veredicto. That case is strongly in favour of the plaintiffs. The Court of Requests' Act is kept alive, so far as to give validity to acts actually done under it; but this is an attempt to extend it to an act which ought to have been done under it.

Sewell, in support of the rule. The case of *Burbidge v. Marvin* (a), is a conclusive authority on the two first points made. [He was desired by the Court to confine himself to the last point.] It is submitted that the Court of Requests' Act is not repealed so far as regards the present case. The Court of Requests' Act, section 40, says, that "if any action," &c., "for any debt recoverable by virtue of this act in the said Court of Requests, shall be commenced in any other Court; the plaintiff," &c., "in such action," &c., "shall not by reason of a verdict for him," &c., "or otherwise, have or be entitled to any costs whatsoever." Issuing a writ is the commencement of an action; and here the writ was issued on the 1st of December, 1846, when the Court of Requests was still in existence, for the County Court was not opened till the 22nd of March, 1847, more than three months after the issuing the writ. Then this is the case of a plaintiff "commencing" an action in another Court, than the Court of Requests, for a debt recoverable in the Court of Requests; and, therefore, the deprivation of costs must follow; unless, indeed, the Court of Requests' Act was wholly and entirely repealed by the institution of a local Court under the Small Debts' Act. This, however, is not so, for by the 5th section of the County Courts' Act, it is enacted, "that from and after the time mentioned in any such order, the act or acts under which such Court is now constituted, so far as the same relate to the establishment or jurisdiction, or practice of a Court for the recovery of small debts or demands, shall be repealed," &c., and by the 7th section of the latter act, it is provided, "that all proceedings in execution of the said acts, or any of them commenced before the

/(a) *Ante*, vol. 1, p. 605; S. C. 12 M. & W. 8. /

passing of this act, or before the days severally appointed for the alteration of the constitution of the said Courts, shall be as valid to all intents and purposes as if this act had not been proved, or as if the said Courts had not been altered, and may be continued, executed, and enforced against all persons liable thereto in the same manner as if they had been commenced under the authority of this act." Had the plaintiffs brought their action in the Court of Requests it might have been continued under this section; and as they did not, but sued in the Superior Court, whilst the Court of Requests existed, they became immediately disabled from recovering any costs, in the event of their obtaining a verdict, and the right to enforce that disability was saved by the above sections.

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Curr. adv. vult.

WIGHTMAN, J.—This was a rule calling upon the plaintiffs to shew cause why the execution signed herein should not be set aside, and why the plaintiffs should not bring into Court and file the plea roll, so that the defendant might enter a suggestion thereon, that the debt recovered in the action did not amount to 5*l*, and that the defendant, at the time of the commencement of the action, was an inhabitant of, and resident at, Newport, in the Isle of Wight, and liable to be summoned to the Isle of Wight Court of Requests, pursuant to the statute in that case made and provided.

It appeared that, on the 1st of December, 1846, a writ was issued at the suit of the plaintiffs against the defendant in an action of debt, which was served on the 28th of March, 1847; and on the 20th of April, judgment by default was signed. On the 22nd of March, a County Court had been appointed to be held, instead of the Isle of Wight Court of Requests, under the provisions of the 9 & 10 Vict. c. 95. It was said in answer to this rule that the 9 & 10 Vict. c. 95, s. 5, had repealed the Isle of Wight Court of Requests' Act, which deprives a plaintiff of costs where he recovers less than

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5*l.* in an action in a superior Court, on a debt recoverable in the Court of Requests; and that the plaintiffs, therefore, were, notwithstanding, entitled to their costs.

The Isle of Wight Court of Requests' Act, the 46 Geo. 3, c. lxvi., s. 40, enacts, that "if any action," &c., "for any debt recoverable by virtue of this act in the said Court of Requests, shall be *commenced* in any other Court; the plaintiff," &c., "in such action," &c., "shall not, by reason of a verdict for him," &c., "or otherwise have or be entitled to any costs whatever." It is admitted, that when this action was commenced, namely, on the 1st of December, 1846, the debt was recoverable in the Court of Requests; and that being so, it seems to me that the plaintiffs would not be entitled, by reason of a verdict for them, to any costs whatever, the words in the Court of Requests' Act having reference to the "commencement" of the action. At the moment when the action is "commenced" in the Superior Court, the plaintiff's right to any costs whatever is taken away. But it was said, that here the plaintiffs had not obtained a verdict, and, therefore, the act did not apply. The act, however, contains the words "or otherwise," and the case of *Burbidge v. Marvin* (*a*) is a conclusive authority that these words include a judgment by default like the present.

Then is the Court of Requests' Act repealed entirely and absolutely by the 9 & 10 Vict. c. 95, s. 5? It appears to me that it is not. The repeal clause in the latter act is not an absolute and general, but a qualified and restricted clause of repeal. It says, that "from and after the time mentioned in any such order the act or acts under which such Court is now constituted, so far as the same relate to the establishment or jurisdiction, or practice of a Court for the recovery of small debts or demands, shall be repealed, but not so as to revive any act repealed." The clause, therefore, is not an absolute repealing clause, but only so far as the act repealed related to the establishment

(*a*) *Ante*, vol. 1, p. 605.

or jurisdiction, or practice of a Court, for recovery of small debts.

It, therefore, seems to me, that it does not repeal so much of the 46 Geo. 3, c. lxvi., as relates to depriving the plaintiff of costs, where he brings his action in the Superior Court for a debt recoverable, at the time of commencing his action, in the Court of Requests. The rule, therefore, will be absolute, the defendant undertaking to bring no action; otherwise, the rule to be absolute for entering the suggestion only.

Rule absolute accordingly.

In re Constables of HIPPERHOLME cum BRIGHOUSE.

PIGOTT moved for a certiorari to remove the appointment of two paid constables by justices at a special sessions, together with the resolution of vestry on which it had been founded, or the copy of such resolution transmitted to the justices, under the 5 & 6 Vict. c. 109, ss. 18 and 19 (a), on

(a) 5 & 6 Vict. c. 109, s. 18. "That it shall be lawful for the vestry assembled for the purpose of making such return as aforesaid to resolve that one or more paid constables shall be appointed for their parish; and if the vestry shall so resolve, a copy of the resolution, and of the amount of salary which the vestry shall resolve on paying to such constable or constables, shall be sent by the overseers to the justices, with the return herein-before mentioned."

Sect. 19. "That the justices at the session of the peace holden

for the appointment of constables, upon receiving from any parish a copy of any such resolution as aforesaid, if they shall be satisfied with the amount of salary agreed to be paid, shall appoint so many paid constables to act for that parish as shall be agreed to by the resolution, or if the same resolution shall have been agreed to by more parishes than one adjoining each other, may, if they shall think fit, appoint the same paid constables to act conjointly for all such last-mentioned parishes," &c.

c. 69, amended by the 59 Geo. 3, c. 85, a poll having been demanded and refused, and the resolution being carried by a show of hands.

A certiorari being granted for that purpose, it is competent to the parties moving to shew upon affidavit that the irregularity in the proceedings of the vestry was of such a nature as to take away the jurisdiction of the justices.

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A certiorari will not lie to bring up a resolution of vestry for the appointment of paid constables under the 5 & 6 Vict. c. 109, s. 18.

Nor the copy of such resolution forwarded to the justices in special sessions, on which they made the appointment.

But it will lie to bring up the appointment itself made by the justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to the 58 Geo. 3,

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the ground that the proceedings in vestry were not conducted in conformity to the 58 Geo. 3, c. 69, amended by the 59 Geo. 3, c. 85; a poll having been demanded and refused, and the resolution being come to by a show of hands.

He submitted that a certiorari would lie to remove the resolution, as no appeal was given by the statute, and the resolution was in the nature of a judicial act. [*Coleridge, J.*—Have you any authority to shew that a certiorari will lie to remove a proceeding in vestry?] There is no case exactly in point. The acts before the 5 & 6 Vict. c. 109, generally contained clauses of appeal. Here, there is none; and if the resolution is invalid, by reason of a poll having been refused, the overseers, who are bound to make the payments of the salaries of paid constables out of the poor rates, ought not to be compelled to resist the objection. [*Coleridge, J.*—It would be opening a great door to litigation, if all orders of vestry could be brought into this Court by certiorari, to be quashed, whenever their validity is questioned.] At any rate the certiorari might go to bring up the appointment by the justices, and the copy of the resolution of the vestry transmitted to the justices.

COLERIDGE, J.—You may have a certiorari to bring up the appointment of the justices, if you like; but I have great doubt about the rest of your motion. You had better see if you can find any case on the subject.

On the following day,

Pigott renewed his motion, stating that he had been unable to find any satisfactory authority. In *Regina v. Coles (a)*, a table of the fees and allowances to be taken by the clerk of the peace for the county of S., duly settled and approved by the sessions, and confirmed by the Judges of assize, under stat. 57 Geo. 3, c. 91, was held to be a judicial proceeding, removable by certiorari. [*Coleridge, J.*

—There, however, it was clearly an act of the inferior Court.] The copy of the resolution of the vestry is the document on which the appointment of the sessions was made; if a certiorari, therefore, goes to remove the latter, it will go to remove the former also. [Coleridge, J.—That question arose with respect to bringing up the examinations on a certiorari to bring up an order of removal. It was done in one case (a), but we intimated our opinion in a subsequent case, that the writ had issued improvidently (b), and in the latter case, refused to grant a certiorari for the purpose.] In the case of examinations of a pauper the sessions do not keep them in their custody, that, therefore, might be one ground why the Court would not direct them to send up the examinations, and, indeed, was relied upon with that view, on shewing cause in *Reg. v. Justices of Buckinghamshire* (c).

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Cur. adv. vult (d).

COLERIDGE, J.—This was an application to remove the appointment of two paid constables by justices at a special sessions, together with the resolution of vestry on which it had been founded; or the copy of such resolution transmitted to the justices for that purpose under the 5 & 6 Vict. c. 109, ss. 18 and 19. I expressed an opinion at the time the motion was made, that such an instrument as this resolution of vestry is not properly removable by certiorari, and I desired Mr. Pigott to search for any authority to warrant its removal. He has found none, nor am I aware of any, and the principle is clearly against him, for certiorari lies properly to remove the proceedings of some Court or body acting judicially.

✓(a) See *Reg. v. Inhabitants of Rotherham*, 3 Q. B. 776.

2 G. & D. 560.
✓(c) 3 Q. B. 800, 805; S. C.
2 G. & D. 560.

(b) See *Ex parte The Overseers of Tollerton*, 3 Q. B. 792, 798; S. C. 2 G. & D. 533. See also *Reg. v. Justices of Buckinghamshire*, 3 Q. B. 800, 807; S. C.

(d) The judgment was delivered on a subsequent day, by Wightman, J., for Coleridge, J.

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The writ, therefore, cannot go for any of the proceedings at vestry. It is very questionable, indeed, whether, if the resolution were before this Court, the grievance of which the party complains could be remedied by that course; for the grievance complained of is, the refusal to take a poll, when demanded, and the having decided the question on the shew of hands. On the face of the resolution there would be no objection to its regularity, and it is very doubtful whether it could be contended that there was any want of jurisdiction in the vestry,—anything more than an irregularity in the course of their proceedings to arrive at it. However, if that could be shewn by affidavit, on the ground that the irregularity was of such a nature as to take away the jurisdiction, and so the appointment be quashed; that may equally be done upon the mere bringing up of the appointment by the justices, for which the writ may certainly go.

Writ granted accordingly.

REGINA v. Justices of DURHAM.

Order of removal of a man, his wife, and children, in March, 1846. In the April following, the man alone was removed (the execution of the order as to the wife and children not having been suspended), and notice of appeal given for the next Midsummer Sessions, but not entered or heard in consequence of negotiations between the contending townships. The pauper having returned to the removing parish, was removed a second time, together with his wife and children, on the 23rd of December, under the same order. The appellant township then appealed to the Epiphany Sessions, 1847, against the order: *Held*, that the appeal was too late.

A RULE had been obtained in Easter Term last, calling on the justices of the peace for the county of Durham, to shew cause why a mandamus should not issue, directed to them, commanding them to enter continuances and hear an appeal of the overseers of the township of Danby, against an order under the hands and seals of two justices of the said county of Durham, for the removal of George Gansby, Jane, his wife, and their two children, (naming them) from the township of Merrington to the township of Danby.

It appeared from the affidavits, that the order of removal was made in March, 1846, and that a copy thereof, and of the examinations on which it was founded, was served on the overseers of Danby on the 27th of the same month. The next sessions were held on the 6th of April, but no appeal was entered at that sessions. On the 22nd of April, Gansby alone was removed under the order to Danby, where he was delivered to the overseers, and a certificate was shewn to them that the wife was unwell, but the order itself was not formally suspended as to her or the children. Notice of appeal was given on the 29th of May following, for the ensuing Midsummer Sessions. A negotiation for adjusting the dispute took place between the attorneys of the contending townships. This negotiation ultimately went off, but it had the effect of preventing the appeal from being entered or heard at the Midsummer Sessions. Gansby, the pauper, after remaining two days in the union workhouse, to which he was sent by the appellant township, returned to the respondent township, and there maintained himself and his family until the December following, when he again became chargeable. He was then, on the 23rd of December, together with Jane his wife, and the two children named in the order, removed under the same order. Against the order and this last removal under it, an appeal was entered and respited at the then ensuing Epiphany Sessions, and came on to be heard at Easter, when the respondents objected that it was brought too late. The sessions held this objection to be valid, and refused to hear the appeal. The above rule having been accordingly obtained,

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Granger now shewed cause. The sessions acted rightly in refusing to hear this appeal. It ought to have been tried at the Midsummer Sessions, and the appellants ought not, having once given notice of appeal against this order, to lie by, and afterwards to deliver a notice of a fresh appeal against the same order. As respects Gansby himself, it

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must be taken that his removal was acquiesced in, and, if so, the settlement of the wife and children being derivative, would follow the fate of his. The appellant township gave no notice that they did not intend to accept the removal as to the wife and children.

[The Court called on]

Heath, to support the rule. It is admitted that a parish cannot appeal twice, first on the service of the order, and then again on the actual removal. Here, however, there has been but one appeal actually brought, although notice of a former appeal was given, but not prosecuted. The question is, when did the removal take place so as to give rise to the right to appeal. An order may be bad as to some of the persons therein named, and good as to the others (*a*). It is only when persons whose settlement is disputed are removed, that a grievance can be said to be sustained, and, consequently, the right to appeal to accrue. The acts of Parliament giving power of appeal are to be construed liberally. Here the grounds of

(*a*) An order may, as to part, be good and be affirmed, and, as to other part, be bad, and be quashed; *Anon.* Comb. 478; where Lord *Holt* says of an order to remove several families, that upon appeal, the sessions may reverse it, quoad one. *Wangford v. Brandon*, Carthew, 449, is apparently the same case. In *R. v. Trinity in Chester*, 2 Bott, ca. 867; S. C. 2 Sess. Cases, 74, an order for removing a man, his wife, and children, but not stating their ages, was allowed to be good quoad the father and his wife, though not as to his children. In *Reg. v. All Saints, Newcastle-upon-Tyne*, 1 Q. B. 428; S. C. 1 G. & D. 133,

it was held to be no ground for quashing an order that it included and removed a mother and son, having each a *separate* and *independent* settlement. There, it is manifest, one of the settlements might be good, and the other bad. In *R. v. Leeds*, 1 Car., Ham. & Allen's New Sess. Cases, 257, an order for removing a wife and four children was held bad as far as concerned the wife and two of the children, but good as to the other two children who were above the age of nurture. In all these cases the appeal seems to have been generally against the whole order, and not confined to part of it.

appeal upon the second occasion may have been, that the woman was not married to the pauper, or that the children were illegitimate. [*Wightman, J.*—Your notice of appeal is against the order generally, and not against the removal of the wife and children only.] The form of notice is always general. The removal of Gansby alone binds us as to his settlement only, and the removal afterwards of the wife and children is a fresh grievance (a). If this rule is discharged, on the ground that the appeal is too large, and that it ought to have been confined to part of the order, that will be requiring greater strictness and exactness in a notice of appeal than in a civil pleading. In an action on a policy of insurance you may, under a declaration for a total loss, prove and recover for a partial loss.

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WIGHTMAN, J.—Unless I am satisfied that the sessions were clearly wrong in refusing to hear this appeal, this rule must be discharged. It seems to me that I should be going further than any authority has yet gone, if I were to consider the appellants not out of time under the circumstances of the present case. The order was made in March, 1846, for the removal of the pauper, his wife, and children, and, in the following month, the man alone was removed, and a notice of appeal given for the next Midsummer Sessions against the order. In December of the same year, the man having in the meanwhile returned, was again removed, together with his wife and children, under the same order. Now, when the order was served in March, 1846, the parish officers of Danby were entitled to appeal, or wait till the removal, and then appeal. It appears that, in point of fact, they purposed taking the latter course, although owing to some negotiations that took place, the appeal was

(a) Under the old law, there could be no appeal until the order was executed; per Lord Ellenborough, C. J., in *Rex v. Marylebone*, 13 East, 50; *Rex v. Inhabitants of Norton*, 2 Stra. 831. See *Milbrook v. St. John's, Southampton*, 2 Bott, ca. 955.

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never entered or heard. The present appeal, however, is neither an appeal to the next practicable sessions after the order made, treating the order as the grievance, nor to the next practicable sessions after the removal of the pauper under that order. I, therefore, think that the appellants were too late, and the present rule for a mandamus must be discharged.

Rule discharged.

COURT OF EXCHEQUER.

Trinity Term.

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

The ATTORNEY GENERAL v. HALLETT.

Sc. 1. L. 12. 211.

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INFORMATION by the Attorney General. The first count stated, that before and at the time of the committing of the offence hereinafter mentioned, our Lady the Queen was and still is seised in her demesne, as of fee, in right of her Crown of England, of and in a certain forest called Waltham Forest, within the county of Essex, and that our said Lady the Queen, and all her ancestors, Kings and Queens of England, and their assigns, have continually held and enjoyed the said forest, and the game, of wild beasts and fowls, of forest, chase, and warren, coming and arising

An information by the Attorney General stated that the Queen was seised in fee of a certain forest, &c., and that she and all her ancestors, kings, &c., continually held and enjoyed the said forest, and the game of wild beasts and fowls of forest, chase,

and warren, coming and arising from the said forest, and all rights, &c., without any disturbance, title, or claim, &c. : that the defendant, without any lawful warrant, right, or title, erected a fence, and dug a ditch in and upon the soil of the said forest, to wit, in and around one hundred acres of land, being parcel of and within the said forest, and encroached and usurped thereon, and separated the same from the residue of the said forest ; whereby the Queen could not have and enjoy the said forest, or the said game, and the said rights, &c., in as full and ample a manner as she ought ; to the great injury and disturbance of the Queen in the said forest, and to the great damage and destruction of the vert and venison of and in the said forest, &c. Plea, "that the place in which, &c., was not, nor was any part thereof, parcel of or within the supposed forest, modo et forma."

Held, on demurrer to the plea, that the cause of action was ambiguously stated, and that the information must be considered in the nature of an action of trespass on the case for injury to the incorporeal right of forest, by interfering with the game ; and that therefore, the plea was good, the defendant not being bound to make title to the land.

Held also, that such a plea would be bad, if pleaded to an information of intrusion into lands of the crown.

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of and from the said forest, and all rights, profits, privileges, liberties, and franchises appertaining thereto, without any disturbance, title, or claim made, or pretended thereunto, until the time of the committing of the offence hereinafter mentioned, and that our Lady the Queen still of right ought to have and enjoy the said forest, and the said game, and the said rights, profits, privileges, liberties, and franchises, in as full and ample a manner as hath always been accustomed: that R. Hallett, of the parish of, &c., to wit, on the 1st day of January, A.D. 1845, and on divers other days and times afterwards and before the day of exhibiting this information, at the parish aforesaid, in the county aforesaid, without any lawful warrant, right, or title in that behalf, unlawfully erected and made, and caused to be erected and made, a high and wide fence, and dug and made a deep and wide ditch, in and upon the soil of the said forest, to wit, upon and around divers, to wit, one hundred acres of land, situate and being in the parish aforesaid, &c., and being parcel of and within the said forest, to wit, a fence of the height, to wit, of eight feet, and of the width, to wit, of six feet, and a ditch of the depth, to wit, of three feet, and of the width, to wit, of six feet, and thereby and therewith enclosed a great part, to wit, the said one hundred acres of the said forest, and encroached and usurped thereupon, and separated and divided the same from the residue of the said forest, and wrongfully and unjustly kept and continued the said fence so erected and made, and the said ditch so dug and made as aforesaid, and the said part of the said forest so separated and divided and encroached and usurped upon as aforesaid, for a long time, to wit, from thence hitherto: whereby, and by reason of the premises, our Lady the Queen cannot have and enjoy the said forest, and the said game, and the said rights, profits, privileges, liberties, and franchises, in as full and ample a manner as she of right ought to have and enjoy the same: to the great injury and disturbance of our said Lady the Queen, in the said forest, to the great damage and

destruction of the vert and venison of and in the said forest, to the disinheritance of our Lady the Queen in the premises, and contrary to the laws in that behalf.

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The second count stated, that the defendant unlawfully kept and continued, erected, and made on the soil of the forest, a high fence and deep ditch, to wit, around one hundred acres of land, being parcel of and within the said forest, whereby a great part, to wit, the said one hundred acres of the said forest were then enclosed and encroached and usurped upon, and separated from the residue of the said forest, &c.

There were two other counts similar to the above.

Plea: that the said place in which, &c., was not, nor was any part thereof, parcel of, or within the supposed forest, in manner and form as in the said first count alleged: concluding to the country.

There were similar pleas to the other counts.

General demurrer and joinder.

The points for argument on behalf of the Crown were—First, that the pleas are not pleaded according to the rules of law which apply to pleadings against the Crown. As against the Crown, a defendant can only either plead “not guilty” by the common law, or specially plead his own title by the statute law; and that each plea ought to shew a sufficient title in the defendant, if it was intended to rely upon such title against the Crown. Secondly, that the plea is double and uncertain, as tending to raise double and uncertain issues in this, to wit, whether the locus in quo is part and parcel of the forest of Waltham, and whether there is any such forest.

The *Attorney General* (Sir J. Jervis) (a) in support of the demurrer. No such plea as the present can be found in any book of entries or in any record. The ancient writers differed as to the meaning of the term “forest.” Lord

(a) Michaelmas Term, 1846.

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Coke says (a), "A forest doth consist of eight things, viz., of soil, covert, laws, Courts, Judges, officers, game, and certain bounds." *Manwood* (b) says, "A forest doth chiefly consist of these four things, that is to say, of vert, venison, particular laws and privileges, and of certain meet officers appointed for that purpose, to the end that the same may the better be preserved and kept for a place of recreation and pastime, meet for the royal dignity of a prince." [*Parke*, B.—This information does not use the word "intrude." It differs from the old form. The precedent in *Lord Coke's Reports* (c) alleges that the Crown is possessed by record. The reason assigned for requiring a defendant to plead specially is, because the title of the Crown is of record.] The present question must be considered as at common law. This case is not within the 21 Jac. 1, c. 14, s. 1, which enacts, "that whensoever the King, his heirs or successors, and such from or under whom the King claimeth, and all others claiming under the same title under which the King claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought or to be brought, to recover the same; that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially." If the defendant had pleaded "not guilty" under that statute, the Crown would have succeeded, on proof of possession, at any time within twenty years. In *The Attorney General v. Mitchell* (d), it was held that the general issue might be pleaded to an information of intrusion, although it contained an averment that the Crown had been in possession within twenty years. The defendant ought either to have denied the intrusion by plea of "not guilty," or have pleaded "non intrusit," or have set up a

(a) 4 Inst. 289.

1 Rep. 26, a.

(b) Cap. 1, s. 2, p. 41.

(d) *Hayes' Rep.* 551, (Irish).

(c) The case of *Alton Woods*,

"monstrans de droit;" *Coke's Entries*, p. 372. The present plea raises the question of parcel or no parcel. Everything within the territory of the forest is subject to forest law, but this plea puts in issue the title of the Crown. The rule of law, with respect to prerogative pleading, materially differs from that of pleading by the subject. Even if the Crown alleges a seisin in fee, an intruder must, nevertheless, make title; *Leigh v. Hudson* (a). In the case of *Rex v. The Bishop of Worcester* (b), *Vaughan*, C. J., says, "But it must be agreed there are cases in which the King may desert his own title, and not join issue upon the defendant's traversing the King's title, or avoiding it, but traverse the title made by the defendant in his bar, which is directly taking a traverse upon a traverse, which regularly a common person cannot do; nor I think in any case, but where the first traverse tendered by the defendant is not material to the action brought, as in the case of waste in *Long*, 5 E. 4, *Hob. Digby and Fitzherbert's case*, and *Woodroffe and Codford's case*, 37 *Eliz. Hob.*, fol. 105." Again (c), "If the King be once seised, his Highness shall retain against all others who have not title, notwithstanding it be found also that the King had no title, but that the other had possession before him, as appeareth in 37 *Ass.*, p. 35, which is pl. 11, where it was found, that neither the King nor the party had title, and yet adjudged that the King should retain; for the office that finds the King to have a right or title to enter, makes even the King a good title, though the office be false, &c. And therefore no man shall traverse the office, unless he make himself a title; and if he cannot prove his title to be true, although he be able to prove his traverse to be true, yet this traverse will not serve him." An information of intrusion is not a proceeding to try the title of the Crown, but is in the nature of an inquisition to find upon what ground the defendant intruded; *Norris v. Butler* (d). Before the statute

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(a) 2 Dyer, 238, b.

(b) *Vaugh.* 62.

(c) Page 64.

(d) *Saville*, 4.

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of James "not guilty" pleaded to an information of intrusion was no more than non intrusit; *Heydon v. Ware* (a). The same law applied to an information exhibited by a common person for the King, and if in that case the defendant pleaded in bar and traversed the information, the King might traverse the matter in bar, and was not bound to maintain the matter contained in the absque hoc; *Rex and Parker v. Webb* (b). If the Crown were to make a grant of a forest the grantee could not take it quâ forest, but only as free warren. Forests were originally formed by perambulations which have been established and made good by acts of Parliament. Great complaints were formerly made respecting them, and commissioners were appointed to ascertain and certify their metes and bounds; 4 *Inst.* 302; *Manwood*, 38.

Willes contrâ. The plea is good. The present information differs from the usual form. First, it does not shew title in the Crown by record; and, secondly, it does not properly allege an intrusion, but only states that the defendant *encroached and usurped upon* the forest. The case of *Alton Woods* (c) shews the correct form of information. This is not like the case of an information of intrusion upon *land*, for there a plea of defendant's seisin in fee of the land would afford a good defence; but a plea of title would be no answer to this information. It is argued that this case is not within the statute of James; if that be so, and if the defendant had pleaded "not guilty" at common law, a verdict for him on that plea would have put the Crown in possession. In *Burton's Exchequer Practice* (d) it is said, "The ancient course of the Exchequer hath been, that if in an information of intrusion into lands or tenements the defendant pleads 'not guilty,' he shall lose the possession; and it is said that the reason of this course is, first, for that regularly the King's title appeareth of the record, and,

(a) Saville, 66.

(b) Cro. Jac. 480.

(c) 1 Rep. 26, a.

(d) Page 401.

therefore, the defendant may take knowledge thereof, and the rather for that in every information of intrusion, it is specified of whose possession the lands, &c., were: but if the defendant plead 'not guilty,' the King's learned counsel cannot know the defendant's title to provide to answer the same, as the defendant may do to the King's title; 4 *Inst.* 116; *Dyer*, 7; *Eliz.* 238." If the statute of James applies to incorporeal hereditaments, and the Crown could shew a possession within twenty years, the defendant would be excluded from giving evidence of title. The defendant contends, that the locus in quo is not parcel, but a purlieu of the forest. In *Comyn's Dig.*, tit. "*Chase*," (I. 1), it is said, "For in the time of Hen. 2, Ric. 1, and John, many lands adjoining to the King's forests were encroached within the forest, which by charta de forestâ, 1, 3, made 17 John, and confirmed, 9 Hen. 3, were to be disafforested, and afterwards by perambulations made in the time of Edw. 1 and Edw. 3 disafforested; and the lands so disafforested are named the purlieu or pourallée, *Manw.* 319 to 365. And, therefore, the purlieu of a forest is land adjoining to a forest, known by meers immovable upon record, which was within the forest, but is now disafforested, *Manw.* 318." In the same book tit. "*Chase*," (A. 2) it is said, "So by the stat. 16 Car. 2, c. 16, the meers, limits, bounds, &c., of every forest shall not extend beyond what were taken to be so, 20 Jac. 1." With respect to the objection that the plea is uncertain, the case of *Evestaff v. Russell* (a) shews that the use of the word "supposed" does not render it bad.

The Attorney General in reply. If the locus in quo is not part of the forest, the defendant ought by his plea to have shewn in what way it was disafforested. The present plea puts in issue the title of the Crown, and also denies the encroachment. The title of the Crown is a proceeding in rem, because it must exist either by record or office found.

Cur. adv. vult.

(a) 10 M. & W. 365; S. C. 1 Dowl. 950, N. S.

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The judgment of the Court was delivered by PARKE, B. (a) (after stating the pleadings). The question which arises upon each of these counts is the same. If this were an information of intrusion into the *lands* of the Crown, there is no doubt that all these pleas would be bad, for it is clear that a defendant in such an information cannot deny the title of the Crown. He must shew some title in himself if he plead specially. On such an information, a defendant is supposed to be in possession of the lands claimed by the Crown, and he must maintain his possession and shew it to be legal. But we cannot infer from any allegation in this information that the Crown claims the soil of the locus in quo. The cause of action is ambiguously stated, and the information may be supported by evidence, shewing the title to the soil itself, or that the encroachment was within the limits of the Queen's forestal rights. We have searched in vain for authorities in point upon this subject, nor can we find precedents for information of intrusion into a forest. It seems to us, after much consideration, that we cannot look upon this in any other light than as an information in the nature of an action of trespass on the case for an injury to the incorporeal right of forest by interfering with the game; and if so, we find no authority for holding that the defendant is bound to plead title to the land which he uses in such a way as to be injurious to the game. We, therefore, think that our judgment must be for the defendant.

Judgment for the Defendant.

(a) Trinity Vacation, 1847.

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LANSDALE v. CLARKE and Another.

J. C. - 1. 4th R. 78.

DEBT for goods sold and delivered, and for money due on an account stated.

De injuriâ is a good replication to a plea under the Tippling Act, 24 Geo. 2, c. 40, s. 12.

Plea: As to the sum of 11*l.* 18*s.* 6*d.* parcel, &c., that the said sum was and is a certain sum or demand claimed by the plaintiff from the defendants, for and in respect of certain spirituous liquors by the plaintiff supplied to the defendants at divers days and times between, &c., and not a debt or demand for or in respect of any other or different matter; and that no part of the said sum hath been or was bonâ fide contracted by the defendants at any one time to the amount of 20*s.* or upwards. Verification.

Replication de injuriâ.

Special demurrer, assigning for causes that the plea is an absolute bar and extinguishment of the rights of action, to which it is pleaded, and shews that the plaintiff never had any right to sue as to these rights of action, and that it is not in excuse.

Hawkins in support of the demurrer. The plea is framed on the 24 Geo. 2, c. 40, s. 12, which enacts, "that no person or persons whatsoever, shall be entitled unto or maintain any cause, action or suit for, or recover either in law or equity, any sum or sums of money, debt, or demands whatsoever, for or on account of any spirituous liquors, unless such debt shall have really been and bonâ fide contracted at one time, to the amount of twenty shillings or upwards." That is a general prohibition against the sale of spirits in small quantities, so that no legal and valid contract can be made in respect of them; *Burnyeat v. Hutchinson* (a); *Hughes v. Done* (b). The plea does not confess that any

✓ (a) 5 B. & A. 241.

✓ (b) 1 Q. B. 294; S. C. 4 P. & D. 708.

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debt was due, it merely admits that the spirits were in point of fact supplied, but shews that the defendants were never indebted for them. [*Alderson*, B.—There was a contract in form, though not in substance. *Platt*, B.—The statute uses the word “debt”]. In *Pelly v. Rose* (a), which was an action to recover duties imposed by the Ramsgate Harbour Act (b), the defendant pleaded certain facts which brought him within the exempting clause, and it was held that *de injuriâ* could not be replied, as the plea did not set up matter of excuse, but amounted to a denial of the existence of a debt. The present case is similar in principle.

Cooling appeared to support the replication, but was not called upon.

POLLOCK, C. B.—The replication is good. The plea confesses a contract, but seeks to excuse the liability to pay the debt by reason of the transaction being illegal. According to the case of *Cooper v. Garbett* (c) *de injuriâ* is a proper replication to such a plea.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the Plaintiff.

(a) *Ante*, vol. 1, p. 601; S. C. 12 M. & W. 435.

(b) 32 Geo. 3, c. lxxiv.

✓ (c) 13 M. & W. 33; S. C. *ante*, vol. 1, p. 969. See *Washbourn v. Burrows*, *post*, p. 105.

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BRITT v. PASHLEY and Others.

d.C. / R. R. 64.

TRESPASS. The declaration stated that the defendants, with force and arms, &c., broke and entered a certain dwelling-house of the plaintiff, and then forced and broke open, broke to pieces, damaged, and spoiled divers locks, &c., and then seized and took divers goods and chattels, to wit, &c., and then cast and threw the same about, and then carried away the same out of the said house, and cast and threw the same upon the ground, &c.

An order of reference contained a clause restraining either party from bringing or prosecuting any action or suit in any Court of law or equity.

Held, that the finding of the arbitrator was conclusive, and that the plaintiff could not have judgment non obstante veredicto, on a bad plea.

The defendants pleaded (with other pleas) fourthly to the whole declaration, that the dwelling-house in which, &c., was the dwelling-house, soil, and freehold of some of the defendants, wherefore they in their own right, and the other defendants as their servants, and by their command, broke and entered the dwelling-house; and because the said goods and chattels were wrongfully in the dwelling-house, the defendants seized and took them, and a little cast and threw them about, &c., and removed them out of the house to a small and convenient distance, and there left them for the use of the plaintiff, &c. Verification, &c.

To this plea the plaintiff replied, that the dwelling-house was not the soil and freehold of the defendants; upon which issue was joined.

The cause came on for trial at the Derbyshire Summer Assizes, 1846, when it was, with all matters in difference, referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The order of reference contained the following clause:—"And it is ordered by and with such consent as aforesaid, that neither party do bring or prosecute any action or suit in any Court of law or equity against the said arbitrator, or against each other, for any matter concerning the premises so as aforesaid referred."

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The arbitrator having found the issue on the above plea for the defendants, a rule was obtained, calling on them to shew cause why judgment should not be entered for the plaintiff non obstante veredicto, as to the goods and chattels mentioned in the declaration.

Humfrey shewed cause. The plaintiff is precluded by the terms of the submission from moving for judgment non obstante veredicto. *Chownes v. Brown* (a) decided, that where an order of reference contains a clause restraining the parties from bringing a writ of error, they cannot move in arrest of judgment. Though in the present case the submission does not in terms mention a writ of error, the words "any action or suit in any Court of law" are sufficient to include it. In *Steeple v. Bonsall* (b), it was held that the arbitrator's power was complete and final, and that after an award made, it was not competent for the plaintiff to move for judgment non obstante veredicto, without reference to any special clause restraining the parties from bringing a writ of error.

Whitehurst and *Miller*, in support of the rule. Since the costs of the cause abide the event, the plaintiff is entitled to have the proper judgment entered on the record. The arbitrator had no power to order judgment non obstante veredicto; *Angus v. Redford* (c). He could only find the facts, and the Court will give the proper judgment. *Chownes v. Brown* was decided on the ground that the submission contained an express stipulation that the parties should not bring a writ of error. In *Steeple v. Bonsall*, it does not appear what the terms of reference were. In *Manser v. Heaven* (d) the Court said, "that if there appeared a defect on the face of the award, it might be taken advantage of to invalidate a judgment and execution, as well as to prevent

✓ (a) *Ante*, vol. 2, p. 706.

2 Dowl. 735, N. S.

✓ (b) 4 A. & E. 950.

✓ (d) 3 B. & Ad. 295.

✓ (c) 11 M. & W. 69; S. C.

an attachment, though after the time for setting aside the award." There seems no reason why the Court should not, in like manner, award judgment non obstante veredicto.

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ALDERSON, B.—*Steeple v. Bonsall* (a) governs this case. There the question was, whether the plaintiff could have judgment non obstante veredicto on a bad plea. It was argued that the parties ought not to be prevented from taking the opinion of the Court as to the legal effect of the finding in the award. But the Court said, that the arbitrator "had power to do what the Court could do, and his award therefore put an end to the proceedings." If the plaintiff could not reverse the judgment by writ of error, he cannot have judgment non obstante veredicto.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

✓ (a) 4 A. & E. 950.

BOUSFIELD v. EDGE.

THIS was a rule calling on the plaintiff to shew cause why interlocutory judgment signed herein should not be set aside for irregularity. The declaration contained a count on a bill of exchange by indorsee against indorser, and also a count for money due on an account stated.

The defendant, who was under terms of pleading issuably, pleaded in the following form:—And the defendant, by — his attorney, says, that he, the defendant, did not indorse the said bill, in manner and form as in the said first count mentioned. Conclusion to the country.

And as to the last count of the said declaration, the and form as in the first count mentioned, &c. ; and as to the last count, the defendant says that he did not promise," &c. The plaintiff having treated the first plea as non issuable, and signed judgment, the Court set aside the judgment for irregularity.

L.C. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.
To a declaration containing a count by indorsee against indorser of a bill of exchange, and also an account stated, a defendant under terms of pleading issuably, pleaded thus: "And the defendant, by, &c., says, that he did not indorse the bill in manner
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defendant says, that he did not promise in manner and form, &c. Conclusion to the country.

The plaintiff signed judgment on the ground that the first plea not being in terms confined to the first count, must be taken as pleaded to the whole declaration, and was therefore non-issuable. The present rule having been obtained to set aside that judgment,

Prentice shewed cause. The judgment is regular. The first plea having no formal commencement to limit it to the first count, is pleaded to the whole declaration; *Putney v. Swan* (a). A plea in form pleaded to the whole declaration, but applicable to one count only, is not an issuable plea; *Parratt v. Goddard* (b). A defendant who is under terms of pleading issuably, must not plead so as to invite a demurrer; *Hughes v. Poole* (c). If "never indebted" be pleaded to a declaration containing a count on a bill of exchange, and also a count for goods sold, the plaintiff may treat the plea as a nullity, and sign judgment; *Sewell v. Dale* (d). There is a further objection to these pleas, that they are not in conformity with the rule to plead several matters which confined the denial of the indorsement to the first count only.

The Attorney General and *Thompson*, in support of the rule. Since the rule of Hil. Term, 4 Wm. 4, pt. II. r. 9, pleas need not have any formal commencement, and it is evident, from the conclusion of this plea, that it is pleaded to the first count only, for it traverses the indorsement "in manner and form as in the first count mentioned." In *Vere v. Goldsborough* (e) it was held, that the omission to confine a plea to the particular count to which it applied, did not entitle the plaintiff to sign judgment. It does not appear

(a) 2 M. & W. 72; S. C. 5 6 M. & G. 271.

Dowl. 296.

(d) 8 Dowl. 309.

(b) 1 Dowl. 874, N. S.; S. C.
 9 M. & W. 458.

(e) 1 Bing. N. C. 353; S. C.
 1 Scott, 265.

(c) 6 Scott, N. R. 959; S. C.

whether in that case the defendant was under terms of pleading issuably; that, however, would make no difference. The cases cited on the other side proceeded on the ground, that unless the pleas went to the whole declaration, there would have been part of the declaration unanswered, and upon which the plaintiff would have been entitled to sign judgment. *Worley v. Harrison* (a) shews, that an informality like the present can only be taken advantage of by special demurrer.

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PER CURIAM (b).—The rule must be absolute. The plea may be bad on special demurrer, but that does not warrant the plaintiff in signing judgment as upon a non-issuable plea.

Rule absolute (c).

(a) 3 A. & E. 669; S. C. 5 N. & M. 173.

(c) See *Eddison v. Peagram*, ante, vol. 4, p. 277.

(b) *Pollock, C. B., Alderson, B.*

COOK v. MOYLAN.

2 C. 1244 B. 67.

ASSUMPSIT for the use and occupation of certain rooms and apartments of the plaintiff by the defendant, together with certain household goods, furniture, and other necessities, goods, and chattels of the plaintiff, in and parcel of a certain dwelling-house, by the defendant at his request, and by the sufferance and permission of the plaintiff, for a long space of time before then elapsed, used, and occupied, &c., together with certain household furniture and other necessities, goods, and chattels of the plaintiff therein being, &c.

Plea: That before the defendant held and occupied, used and enjoyed the said rooms and apartments, household

Assumpsit for the use and occupation of furnished apartments. Plea, that before the defendant held the said apartments by the permission of the plaintiff, he held the same as tenant under a demise from A. B.; that while he so held them, A. B. assigned

all her interest therein to the plaintiff; that the occupation in the declaration mentioned was a continuation of the tenancy under A. B., and that the defendant paid A. B. the money in the declaration mentioned without notice of the assignment, and that defendant never expressly promised to pay the plaintiff the money in the declaration mentioned: *Held* bad, as amounting to the general issue.

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furniture and necessaries, goods and chattels, by the sufferance and permission of the plaintiff, he had held and occupied, possessed, and enjoyed the same by the sufferance and permission of one A. B., as tenant to the said A. B., under a demise thereof heretofore, to wit, on, &c., made by the said A. B. to the defendant, the same then being the rooms, apartments, household furniture, necessaries, goods and chattels of the said A. B.; and whilst the defendant so had held, used, occupied, possessed, and enjoyed the said rooms, apartments, household furniture, necessaries, goods and chattels, by the sufferance and permission of the said A. B., as her tenant as aforesaid, under the said demise, and before the use and occupation in the declaration mentioned, to wit, on, &c., the said A. B. assigned and granted to the plaintiff all her estate, interest, and property in the said rooms, apartments, household furniture, necessaries, goods and chattels, and in reversion thereto of her the said A. B., expectant on the determination of the said demise; and the use and occupation in the declaration mentioned was and is a use and occupation after the said grant and assignment in continuation of and under, and by virtue of the same tenancy and demise under which the defendant so held the same under the said A. B. as aforesaid. And the defendant further saith, that after the use and occupation, and after the defendant became indebted in respect thereof, and before the commencement of this suit, &c., to wit, on, &c., the defendant paid to the said A. B., and the said A. B. then accepted of the defendant a large sum of money, to wit, the amount of the monies in the declaration mentioned, in full satisfaction and discharge of the said monies, and of all damages and causes of action in respect thereof. And the defendant further says, that no notice was given to him of the said grant and assignment by or on behalf of the plaintiff, so being the grantee and assignee thereunder at any time before or at the time of the said payment, nor did he the defendant ever attorn or become tenant to, or assent or agree to have, hold, use, occupy, possess, or enjoy the said

rooms, apartments, household furniture, necessities, goods, and chattels, or any of them, or any part thereof, as tenant thereof, to the plaintiff, or otherwise, under or of the plaintiff, or by his sufferance or permission; nor did he ever expressly request the plaintiff to suffer or permit him, the defendant, to have, hold, use, occupy, possess, or enjoy the same, or any of them, or any part thereof, nor did he ever expressly promise the plaintiff to pay him the money in the declaration mentioned. Verification.

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Special demurrer, assigning for cause that the plea was an argumentative denial of the promise alleged in the declaration, and amounted to the general issue.

Creasy, in support of the demurrer. The plea amounts to the general issue. It is an argumentative denial of such an occupation by the sufferance of the plaintiff as would raise an implied promise to pay him. The assignee of a landlord has no right of action against the tenant in possession to recover rent, until after notice. This plea alleges that the defendant never had notice, which is, in fact, a denial that any liability to pay rent to the plaintiff ever arose. In *Moss v. Gallimore* (a), it was held that a mortgagee, after giving notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. So also in *Waddilove v. Barnett* (b), which was an action for use and occupation, it was held that the defendant might, under the general issue, give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice. *Lumley v. Hodgson* (c) is to the same effect. In *Burrowes v. Gradin* (d), *Wight-*

(a) 1 Doug. 279.

(c) 16 East, 99.

(b) 2 Scott, 763; S. C. 2 Bing.
N. C. 538; 4 Dowl. 347.

(d) *Ante*, vol. 1, p. 218.

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man, J., in delivering judgment, says, "Whenever, therefore, a mortgagor conveys his estate to a mortgagee, the tenants of the former become tenants of the latter, subject to all the ordinary incidents to such a relation, amongst which is that of being liable to an action for use and occupation to recover arrears of rent, accruing after the mortgage, and remaining unpaid after notice of the mortgage is given." Besides, the plea contains an averment that the defendant never expressly promised the plaintiff to pay him the money in the first count, except, &c. There is no distinction in pleading between an express and an implied promise; *Kinder v. Paris* (a). The allegation is, therefore, a denial of the promise in the declaration.

Hawkins, contrà. As to the last point, the allegation in the plea denies an express promise, not an implied one. The defendant's object is to negative all liability by shewing that he never held the premises under an express contract, while the previous part of the plea shews that no implied contract could arise.

PER CURIAM (b). We think the allegation in the latter part of the plea renders it bad, as amounting to the general issue. The defendant may, however, amend, by striking those words out; otherwise there must be judgment for the plaintiff.

Amendment accordingly.

(a) 2 H. Bl. 563, n.

(b) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.



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WASHBOURN v. BURROWS.

d C. 1. 12th 12-107.

COVENANT on an indenture for payment of 250*l.*, and interest on demand.

The defendant pleaded, thirdly, that before the making of the indenture, it was corruptly and against the form of the statute agreed by and between the plaintiff, W. B. Cliffe, and the defendant, that the plaintiff should lend and advance to W. B. Cliffe and the defendant the sum of 200*l.*, and that the plaintiff should forbear and give day of payment thereof to the said W. B. Cliffe and the defendant until demand of repayment thereof by the plaintiff; and that upon such demand of repayment thereof, W. B. Cliffe and the defendant should then, for the loan of the said sum of 200*l.*, and for giving the day of payment thereof, give and pay to the plaintiff, more than lawful interest at and after the rate of 5*l.* per cent. per annum on the said sum of 200*l.*, that is to say, the sum of 50*l.*, making, together with the sum of 200*l.* so to be lent and advanced as aforesaid, the sum of 250*l.* in the said indenture mentioned; and also that W. B. Cliffe and the defendant should pay to the plaintiff interest at the rate of 5*l.* per cent. per annum on the said sum of 250*l.*, from the 31st day of May, 1845, until the payment of the sum of 250*l.* in the said indenture mentioned; and that for securing payment of the said sum of 250*l.*, with interest thereon as aforesaid, the said W. B. Cliffe and the defendant should make and seal, as their act and deed respectively, and deliver to the plaintiff a certain

Covenant for payment of 250*l.* and interest on demand.

Plea, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than 5*l.* per cent. by way of interest, and that the payment was secured by a deed whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels and also the crops of grass then growing on certain lands. Replication, that the contract was entered into after the passing of the 2 & 3 Vict. c. 37.

Held, that the plea was good, and the replication bad; for though

the terms "growing crops" might mean crops to be sowed by the owner of the soil, and delivered as a personal chattel; yet the plea *prima facie* shewed an usurious contract within the 12 Anne, stat. 2, c. 16; and if the plaintiff relied upon the 2 & 3 Vict. c. 37, he should have replied that the contract was entered into after the passing of that act, and that the security did not relate to land.

The defendant also pleaded fraud, to which the plaintiff replied *de injuria*. *Held*, a good replication.

Another plea stated that the defendant mortgaged to the plaintiff certain goods and chattels, and that the plaintiff sold the same, and received the proceeds of the sale, and thereby satisfied himself in the sum of 250*l.* and interest, and that he accepted the proceeds in full satisfaction of 250*l.* and interest. Replication, that the plaintiff did not sell the said goods and chattels, nor receive the proceeds of such sale, nor pay himself the sum of 250*l.* and interest, nor accept the said proceeds in satisfaction, &c. : *Held*, that the replication was not double.

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indenture, whereby the said W. B. Cliffe and the defendant should severally covenant with the plaintiff to pay him on demand the sum of 250*l.*, with interest thereon as aforesaid, and should also bargain, sell, and assign to the plaintiff all the goods, chattels, plate, linen, &c., then in and about, and belonging to the dwelling-house and estate in the occupation of the said W. B. Cliffe and the defendant, called Rose Cottage, in the parish, &c., and also *certain crops of grass then growing on the land* of a certain estate called the Sheeping House Estate, at Mathon, in the county of Hereford, such *goods, chattels, and effects* to be severally and respectively enumerated in a certain schedule or inventory to be annexed to the said indenture. [The plea then set out a proviso for making void the indenture on payment of the said sum of 250*l.*, with interest, and a power of sale in case of default in payment]. That in pursuance of the said corrupt and unlawful agreement the plaintiff afterwards, to wit, on, &c., lent and advanced to W. B. Cliffe and the defendant the sum of 200*l.*, and that for securing the repayment thereof, together with the said sum of 50*l.* and interest, after the rate aforesaid, upon the said sum of 250*l.*, so to be paid and given to the plaintiff as aforesaid, on demand, W. B. Cliffe and the defendant, in further pursuance of the said corrupt and unlawful agreement, then to wit, on, &c., made and declared, and as their act and deed respectively delivered to the plaintiff the indenture in the declaration mentioned, whereby W. B. Cliffe and the defendant severally covenanted with the plaintiff as aforesaid, for payment of the said sum of 250*l.*, and interest thereon at the rate aforesaid, and also bargained, sold, and assigned to the plaintiff the said goods, chattels, plate, linen, &c., and *the said crops of grass growing* hereinbefore mentioned, and which were severally enumerated in a schedule or inventory annexed to the said indenture, subject to such proviso, and upon the terms and with the powers, and for the purposes and in the manner aforesaid; and the plaintiff then accepted and received the said indenture so made and containing the several matters aforesaid, of and from the

said W. B. Cliffe and the defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose, and on the terms, &c. The plea then averred, that the sum so agreed to be paid for interest exceeded 5*l*. per cent.; whereby and by force of the said statute the said indenture was and is wholly void in law. Verification.

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Fourth plea: that the alleged indenture was obtained by fraud, covin, and misrepresentation.

The fifth plea set out the power of sale on default of payment of the sum of 250*l*. and interest, and averred that after the nonpayment thereof the plaintiff sold and disposed of the several goods, chattels, and effects in the said indenture mentioned, for the purpose of repaying, satisfying, and discharging the said sum of 250*l*., and the interest then due thereon, and the costs, charges, and expenses in respect thereof. And the plaintiff thereby, and by means of the said sale and disposal, had and received a large sum, to wit, 500*l*., being the proceeds and profits of the said sale and disposal, and thereby and therewith then repaid, satisfied, and discharged to him, the plaintiff, the said sum of 250*l*., and all interest then due thereon, and all costs, &c., and the plaintiff then, and with the consent of the defendant, accepted and received the said proceeds and profits of the said sale and disposal, to wit, the sum of 500*l*., in full satisfaction and discharge, as well of the said sum of 250*l*., and all interest due thereon, as of all damages sustained by the plaintiff, by reason of the alleged breach of covenant. Verification.

Replication to third plea. That the agreement in that plea mentioned was made, and the indenture in that plea mentioned was executed, after the passing of the 2 & 3 Vict. c. 37, and whilst the said act was in force, to wit, on the 31st of May, 1845. Verification.

To fourth plea, *de injuriâ*.

To fifth plea: that the plaintiff did not sell or dispose of the said several goods, chattels, and effects, nor did the plaintiff, by means of such sale and disposal, have or receive

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the said monies, being the proceeds and profits of the said sale and disposal, nor did he, the plaintiff, thereby or therewith, repay, satisfy, or discharge to him, the plaintiff, the said sum of 250*l.*, and all interest then due thereon, and all costs, &c., nor did the plaintiff accept or receive the said proceeds and profits of the said sale and disposal, in full satisfaction and discharge, as in the said last plea mentioned, modo et formâ, &c.

General demurrer to the replication to the third plea.

Special demurrer to the replication to the fourth plea, assigning for causes that the replication was inapplicable, inasmuch as that plea alleges matters which render the indenture null and void in law, and not merely matters in excuse for the non-performance of the covenants.

Special demurrer to the replication to the fifth plea, assigning for causes that the same is double and multifarious, inasmuch as it attempts to put in issue the sale and disposal of the goods, chattels, and effects in that plea mentioned, and also the receipt by the plaintiff of the proceeds and profits of the sale and disposal thereof, and also the plaintiff's defraying, satisfying, and discharging therewith the sum of 250*l.*, and interest, &c., and also the acceptance and receipt by the plaintiff of the proceeds of the sale and disposal, in full satisfaction and discharge.

Joinders in demurrer.

Peacock, in support of the demurrers. The replication to the third plea is bad. That plea shews that the money was lent on an usurious contract. The 2 & 3 Vict. c. 37, repeals the 12 Anne, stat. 2, c. 16, except as to the "loan or forbearance of money upon security of any lands, tenements, or hereditaments, or any estate or interest therein." A crop of growing grass is an interest in land; *Crosby v. Wadsworth* (a). If the crop were such as to come within the definition of fructus industrialis, that should have been alleged in the

(a) 6 East, 602; S. C. 2 Smith, 559.

replication; *Rodwell v. Phillips* (a). For aught that appears on the face of this plea, the crop of grass was the natural produce of the soil. But even if the plea does not shew that the money was secured on an interest in land, it is a good plea of usury, for it brings the case within the provisions of the 12 Anne, stat. 2, c. 16, and if the plaintiff relies upon the proviso contained in the 2 & 3 Vict. c. 37, he should state in his replication that the loan was not secured on an interest in land. The statute of Victoria does not repeal the statute of Anne, but only takes out of its operation all usurious contracts, except such as relate to land; *Thibault v. Gibson* (b).

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Secondly, "de injuriâ" cannot be replied to a plea of fraud. Such a plea does not set up matter of excuse, but shews that there never was any covenant as alleged since the deed was void ab initio. [*Alderson, B.*—This case cannot be distinguished from *Cowper v. Garbett* (c)].

The replication to the last plea is bad for duplicity. The plaintiff ought either to have traversed the sale of the goods, or the receipt of the proceeds in satisfaction. By putting both in issue, the defendant is compelled to prove more than is necessary for his defence; *De Wolf v. Bevan* (d).

Gray, contra. The third plea does not shew that the loan was secured on an interest in land. The allegation of "growing crops of grass," may mean such crops as are not the natural produce of the soil, and would pass to the executor and not to the heir; or it may mean crops of grass then growing, but to be afterwards cut and delivered as goods and chattels. The plea may be construed as meaning either natural or artificial grass. In *Crosby v. Wadsworth*, the contract was for the purchase of a growing crop of grass, to be mown and made into hay by the vendee. The cases

(a) 9 M. & W. 501; S. C. vol. 1, p. 969. See *Lansdale v. Dowd*, 885, N. S. *Clarke and Another, ante*, p. 95.

(b) 12 M. & W. 88; S. C. *ante*, (d) *Ante*, vol. 2, p. 345; S. C. vol. 1, p. 253. 13 M. & W. 160.

(c) 13 M. & W. 33; S. C. *ante*,

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cited were decided on the Statute of Frauds^(a), the language of which differs from the 2 & 3 Vict. c. 37. The judgment of Lord *Ellenborough* in *Crosby v. Wadsworth* (b) proceeded upon the words in the former statute, "any interest in or concerning" lands. In *Evans v. Roberts* (c), *Littledale*, J., says, "The words lands, tenements, and hereditaments, in that section appear to me to have been used by the Legislature to denote a fee-simple, and the words, an interest in or concerning them, were used to denote a chattel interest, or some interest less than the fee-simple." The plea, however, is bad, for not shewing that the contract was either made before, or exempt from the operation of, the 2 & 3 Vict. c. 37. Greater strictness is required in a plea than in a declaration: *Turquand v. Mosedon* (d). It is consistent with this plea that the plaintiff may not have been the owner of the soil, but have purchased the crops on the condition that they should be severed by the owner of the soil.

With respect to the second point, *Cowper v. Garbett* (e) is an express authority to shew that *de injuriâ* is a good replication in this case. The deed is not absolutely void by reason of fraud, but voidable only. It is not like the case of a deed which is falsely read to an illiterate person; *Thoroughgood's case* (f). The title of a purchaser for a valuable consideration is valid, though he purchased of one who had obtained a conveyance by fraud; *Doe d. Bothell v. Martyr* (g). The fraud here pleaded is only such fraud as would avoid the deed as against the perpetrator of the fraud.

Lastly, the traverse taken by the replication to the fifth plea is not too large. It is true that the plaintiff might have put in issue either the fact of the sale or of the payment, but he is not bound to do so. A replication to a

(a) 29 Car. 2, c. 3.

(b) 6 East, 602; S. C. 2 Smith, 559.

(c) 5 B. & C. 829, 839; S. C. 8 D. & R. 611.

(d) 9 Dowl. 282; S. C. 7 M.

& W. 504.

(e) 13 M. & W. 33; S. C. *ante*, vol. 1, p. 969. See *Lansdale v. Clarke and Another*, *ante*, p. 95.

(f) 2 Rep. 9.

(g) 1 N. R. 332.

plea of payment may deny either the payment or acceptance in satisfaction, but it is usual to traverse both; *Webb v. Weatherby* (a). In the case of *De Wolf v. Bevan* (b), the plea contained matter of title, and, therefore, came within the third resolution in *Crogate's case* (c).

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Peacock, in reply, cited *Pomfret v. Ricroft* (d).

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B. This was an action of covenant in which the plaintiff declared on a deed, whereby the defendant covenanted to pay to the plaintiff 250*l.* and interest. To this the defendant pleaded several pleas, and the third plea was, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than 5*l.* per cent. by way of interest, and that the payment was secured by a deed, whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also the crops of grass then growing on certain lands mentioned in the deed; insisting, therefore, that the covenant was void under the statute of Anne. To this plea the plaintiff replied, that the contract was entered into after the passing of the statute 2 & 3 Vict. c. 37; and to this replication there was a general demurrer.

The first question, therefore, is, whether the contract stated in the plea is void under the statute of Anne, notwithstanding the statute of Victoria. It certainly is void, if the plea sufficiently shews that the security consisted in part of an interest in land, for the statute of Victoria has no application to such securities. Now, part of the property assigned by way of security to the lender of the money, consisted of certain crops of grass described in the deed as

(a) 1 Scott, 477; S. C. 1 Bing. 13 M. & W. 160.
 N. C. 502. (c) 8 Rep. 67.
 (b) *Ante*, vol. 2, p. 345; S. C. (d) 1 Saund. 321.

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growing on a certain estate called the Sheeping House Estate, and it was argued on the authority of *Crosby v. Wadsworth* (a), that this is an interest in land. When a sale of growing crops does, and when it does not, confer an interest in land, is often a case of much nicety; but certainly, when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples; or fructus industriales, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which is, in such case, only in the nature of warehouse for what is to come to him merely as a personal chattel. The doubt here is, what is the true meaning of the plea as to these crops? Mr. Gray argued, that the plea would be satisfied by proving that the plaintiff, not being the owner of the Sheeping House Estate, was yet entitled to the grass in question, as having purchased it on the terms that it was to be severed by the owner of the soil, and then delivered to him as a mere personal chattel; and we are inclined to attach great weight to this argument, and think the case will be in the same position as if the plea had contained no reference to the subject-matter of the security, but had merely alleged that the covenant sued on was void, as having been entered into pursuant to an usurious contract for taking more than 5*l.* per cent. interest. Such a contract would clearly be void under the statute of Anne, and that statute being still in force the plea is *prima facie* a good answer to the plaintiff's demand, according to the principle laid down in *Thibault v. Gibson* (b). The question then arises, whether the plaintiff gets rid of the effect of the statute of Anne by merely stating that the contract was entered into after the passing of the statute of Victoria. We think he does not. The true effect of the statute of Victoria is, to except from the operation of the statute of Anne all contracts not relating to land, and the defendant has, by his plea, clearly brought the case within

(a) 6 East, 602.

(b) 12 M. & W. 88.

the operation of the old statute, it is not sufficient for the plaintiff to reply that which may or may not bring the contract within the operation of the statute of Victoria. It was incumbent on him to aver all which is necessary, to shew that the statute of Anne does not apply to the question, namely, that the contract was entered into after the passing of the statute of Victoria, and that it does not relate to land. The replication does aver, that the contract was after the statute of Victoria, but omits to aver that it does not relate to land. It therefore fails to shew what the plaintiff was bound to make out, namely, that the statute of Anne does not apply. On these grounds, therefore, even adopting Mr. *Gray's* argument, as we are inclined to do, that the plea does not shew affirmatively that the security did comprise an interest in land, still we think the plea is good, and that the replication offers no sufficient answer. There must, therefore, be judgment for the defendant on the third plea.

Two other questions were raised in the argument on the fourth and fifth pleas.

The fourth plea was a general plea of fraud, to which there was a replication of *de injuriâ*, and the defendant demurred to this replication as inapplicable to an action of covenant; but we were all of opinion at the time of the argument, and so stated that there was no distinction in principle between this case and the case of a bill of exchange, as to which *de injuriâ* has been held to be a good replication to a plea of fraud like the present; *Cowper v. Garbett* (a).

In the fifth plea, the defendant states, that pursuant to the provisions of the deed, the plaintiff sold the property comprised in the security, and by means of the proceeds of the sale satisfied himself the amount of his debt. The replication traversed the sale and payment of the debt by means of the proceeds, and the defendant demurred to this for duplicity. But we are all of opinion that this is not

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(a) 13 M. & W. 33.

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double. The bar set up is, that the debt has been satisfied by the sale of the mortgaged property, and by application of the proceeds in liquidation of the debt. This is in truth only a special plea of payment; and though several items go to make up the complex fact, yet it is, in truth, but one defence. Judgment, therefore, will be entered on these last two pleas for the plaintiff, and on the third plea for the defendant.

Judgment accordingly.

J.C. 1. 1847. 12.

In a scire facias at the suit of executors, the Court refused to allow judgment by default to be entered up on an affidavit, which omitted to state that probate had been granted; notwithstanding the defendant had notice of the proceedings.

VOGEL and Another, Executors of ANN VOGEL, deceased,
v. THOMPSON.

MILLER moved for a rule absolute for judgment upon a scire facias, on the sheriff's return of nulla bona, and in default of appearance. The affidavit in support of the application stated that the testatrix recovered judgment against the defendant for 45*l*. 14*s.*, and afterwards died, having by her will appointed the plaintiffs her executors: that the defendant had been served with a copy of the scire facias, and with notice that in default of appearance, judgment would be obtained thereon. But the affidavit did not state that probate had been granted to the plaintiffs. It was submitted that such statement was unnecessary, inasmuch as the defendant had received notice of the proceedings, and it was in his power to ascertain whether probate had been granted.

PER CURIAM.—The affidavit is not sufficient. Before we permit judgment to be entered up, we ought to be fully satisfied that probate has been obtained.

Rule refused.

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GILES v. HUTT and Another.

A WRIT of auditâ querelâ having issued in this case,

In an auditâ querelâ, a rule for a supersedeas and venire facias is absolute in the first instance.

G. Pollock moved for a rule absolute for a writ of supersedeas to the sheriff to stay execution, and also for a venire facias. The practice appeared to be, that if the plaintiff was in execution the process was by scire facias, but if not, a venire facias issued. The following authorities were referred to; *Turner v. Davies* (a); *Nathan v. Giles* (b); *Com. Dig.* tit. "Audita Querela," (E 1) (E 5); *Vin. Abr.* "Audita Querela," (N 2); *Noy's Rep.* 145; *Fitz. Abr.* 283; *Rastal's Entr.* 97; *Reg. Brev.* 114.

PER CURIAM.—The rule will be absolute in the first instance.

Rule absolute.

✓(a) 2 Saund. 137 n, 148 f, 6th ed.

✓(b) 5 Taunt. 558; S. C. 1 Marsh, 226.

BAYLEY and Another, Executors of T. K. BAYLEY,
v. BUCKLAND, GORDON, and Others.

SC-1. 2nd R. 1.

THIS was a rule, calling on the plaintiffs to shew cause why the judgment, execution, and all proceedings subsequent to the writ of summons, so far as respected the defendant Gordon, should not be set aside, and why the sum of 368*l.* 9*s.* 7*d.*, levied upon the defendant Gordon's

Where a defendant has been served with process, and an attorney, without authority, appears for him, if the attorney be

insolvent, the defendant will be relieved upon equitable terms, provided he has a defence upon the merits. But if the attorney be solvent, the defendant will be left to his remedy by summary application against him.

But where a plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and expenses from the delinquent attorney.

6. Dec. 57.

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goods, and paid by him into Court, should not be repaid to him or his attorney.

It appeared that the defendants were shareholders in the Vale of Neath Brewery Company, and that the action was brought on a promissory note for 575*l.* 4*s.* 10*d.*, made by the company in favour of the plaintiffs' testator. The writ of summons was issued on the 18th of November, 1846; and on the 24th of the same month, the defendant Buckland, who was the managing director of the company, wrote to the plaintiffs' attorney the following letter:—

“Dear Sir. I am sorry to find that process has been issued by Mr. Bayley's executors against the Vale of Neath Brewery Company. Mr. George Leeds, of Neath, is the solicitor of the company, and will accept service on behalf of all parties, and act for them. I hope you will not allow any unnecessary expenses to be incurred. I enclose a check for 25*l.* 19*s.* 6*d.*, amount of costs indorsed on the writ, and hope to settle the claim before any greater expenses are incurred. Please to acknowledge the receipt of the check, addressed to the company at Neath.

“W. H. BUCKLAND.”

Mr. Leeds accordingly caused an appearance to be entered for the defendant Gordon, as well as for the other defendants, and a declaration having been delivered, issue was joined and notice of trial given, when Mr. Leeds consented to a Judge's order for payment of the debt and costs by instalments. Default having been made in the payment of one instalment, judgment was entered up and execution levied on the goods of Gordon. The affidavit of Gordon stated, that he was never served with any writ in this action, nor, until levy made, had he ever knowledge of any such action having been brought, or of any writ having issued against him, or of any appearance having been entered for him: that he had never appeared to the action, or authorized Mr. Leeds or any person to appear or cause

an appearance to be entered for him. It appeared that Leeds was in solvent circumstances and a person of responsibility.

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Martin (*Skinner* with him), shewed cause. The general rule is, that where an attorney, without authority, has entered an appearance for a defendant, the Court proceeds as if the attorney had authority to do so, and leaves the defendant to his remedy against the attorney. That rule was laid down in an *Anonymous* case in *Salkeld's Reports* (a), and has since been invariably acted on. In that case *Holt*, C. J., says, "The course of this Court is, where an attorney takes upon him to appear, the Court looks no farther, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." In a subsequent *Anonymous* case (b), the rule is stated in similar but qualified terms,— "If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer; for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means." So also in an *Anonymous* case in the *Modern Reports* (c) it is said, "If an able and responsible attorney appear for another without a warrant, and judgment is against him, the judgment shall stand, and the party shall be put to his action against the attorney; but if the attorney be a beggar, or in a suspicious condition, the Court will set aside the judgment." This principle has been acted on in several recent cases; *Stanhope v. Firmin* (d); *Mudry v. Newman* (e); *Williams v. Smith* (f); *Barber v. Wilkins* (g); *Hubbart v. Phillips* (h); *Hambridge v. De la Crouée* (i).

(a) 1 Salk. 86.

(b) 1 Salk. 88.

(c) 6 Mod. 16.

(d) 3 Bing. N. C. 301.

(e) 1 C., M. & R. 402; S. C.
nom. div. 2 Dowl. 695.

(f) 1 Dowl. 632.

(g) 5 Dowl. 305.

(h) 13 M. & W. 702; S. C.
ante, vol. 2, p. 707.

(i) Ante, vol. 4, p. 466; S. C.
3 C. B. 742.

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The Attorney General in support of the rule. It cannot be denied that there is some authority for the practice, but still the Courts have not invariably acted on it. The case in *Salkeld* is very loosely reported. If a party is sued for a debt, and pays the amount to an attorney who has commenced proceedings without authority, the party sued is liable to pay it over again; *Robson v. Eaton* (a). On that ground the Court allowed the application in *Hubbart v. Phillips* (b). There an attorney brought an action without the authority of the plaintiff, and it was held that the defendant might apply to the Court to stay the proceedings, and compel the attorney to pay the costs of his defence. The rule does not appear to be founded on any principle, and the practice is not so inveterate as to preclude the Court from examining the propriety of the rule as stated in *Salkeld's Reports*.

Cur. adv. vult.

The judgment of the Court was delivered by (c)

ROLFE, B.—We took time to consider this case, in order that we might determine what rule it might be proper to lay down as a guide to similar cases in future. There is no dispute as to the facts. The plaintiffs commenced their action against the several defendants, including Mr. Gordon, the party now applying for relief; they served some of the defendants, not including the applicant, Mr. Gordon, with the writ, and after this an attorney at Neath, Mr. George Leeds, was instructed by the parties served to appear, and did appear for all the defendants, except a person of the name of Clarke, for whom an appearance was duly entered according to the form of the statute by the plaintiffs. Mr. Leeds then, by the like authority, consented to a Judge's order to stay proceedings on payment of debt and costs. This order not having been complied with, judgment

(a) 1 T. R. 62.

(b) 13 M. & W. 702; S. C. Term.

ante, vol. 2, p. 707.

(c) In the Vacation after Trinity

against all the defendants was signed, and execution sued out. Under this execution, the goods of Mr. Gordon were seized by the sheriff,—Mr. Gordon never having been served with the writ, and having given no authority, direct or indirect, to Mr. Leeds to appear for him. He now applies to have the judgment set aside, either as an irregular judgment, or, if a regular one, then on an affidavit of merits, and on payment of costs. The only other material fact mentioned in the affidavit is, that Mr. George Leeds, the attorney by whom the appearance had been entered, is in solvent circumstances.

The rule of law hitherto has generally been considered to be as stated in an *Anonymous case* in *Salheld*, 86, that “where an attorney takes upon him to appear, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him:” but they qualified it in *Salheld*, 88, stating that the judgment was regular, “but if the attorney be not responsible or suspicious, they would set aside the judgment, for otherwise the defendant has no remedy, and any one may be undone by that means.” It must be admitted that the reasoning is not very clear, by which the Court arrived at the conclusion, that in so doing they did justice to the defendant; for the non-responsibility or suspiciousness of the attorney is but a vague sort of criterion of safety to the defendant; and by the hypothesis, the defendant is wholly without blame, and may, notwithstanding, be ruined. It is true the plaintiff is equally blameless; but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and possible loss of costs.

We are disposed to lay down a different rule, and to confine the liability of the defendant to cases in which the course of the proceedings has given him notice of the action being brought. When, therefore, a defendant has been served with process, and an attorney, without authority, appears for him, we think the Court must

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proceed as if the attorney really had authority, because in that case, the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence. But even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms, if he had a defence upon the merits. If the attorney were solvent, it would not be unjust to leave the defendant to his remedy by summary application against him.

On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence, for the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so; and upon the same principle on which we before proceeded, we must set aside the judgment as irregular with costs, and leave the plaintiff to recover those costs, and the expense to which he has been put, from the delinquent attorney, by summary proceedings. The case of *Hubbart v. Phillips (a)* is an authority for such an application.

Now applying these principles to the present case, it is clear that the judgment is irregular, and the rule must be made absolute for setting it aside.

Rule absolute.

(a) 13 M. & W. 702.

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ROCHE v. CHAMPAIN.

1 C. 1. 2. 10.

DEBT. The declaration stated the defendant to be indebted to the plaintiff in the sum of 6*l.* 10*s.* for money lent, and in 6*l.* 10*s.* for money had and received, and in 6*l.* 10*s.* for money due on an account stated. The commencement of the declaration was in the usual form, stating the demand to be the aggregate of those sums, 19*l.* 10*s.*

The only plea was a set-off of 50*l.*

The particulars of demand stated the action to be brought to recover the sum of 6*l.* 10*s.* for money lent.

At the trial before the undersheriff of Middlesex, the defendant proved a debt due to him from the plaintiff above 6*l.* 10*s.*, upon which the undersheriff directed a verdict for the defendant.

A rule nisi had been obtained to set aside the verdict, and for a new trial, on the ground of misdirection.

Miller shewed cause. The defendant is entitled to retain the verdict. In an action of debt, the plaintiff was formerly obliged to prove the *whole of his* demand, but now there is no distinction in that respect between a declaration in debt and assumpsit, and in each the plaintiff may recover the amount proved, though less than the sum claimed. [*Alderson*, B.—The defendant ought to have pleaded a set-off as to 6*l.* 10*s.* and never indebted as to the residue]. A plea in confession only admits so much as the plaintiff is bound to prove in support of his demand, and here the plaintiff by the particulars, has limited his claim to 6*l.* 10*s.* The amount beyond that may be considered as struck out of the declaration. In *Cousins v. Paddon* (a), *Parke*, B., says, “Whilst it was considered to be law, that an action of debt on simple contract was founded on one entire single contract, and

A declaration in debt contained counts for money lent, money had and received, and money due on an account stated, in each of which the defendant was alleged to be indebted to the plaintiff in 6*l.* 10*s.* The defendant pleaded a set-off of 50*l.* The particulars of demand claimed 6*l.* 10*s.* for money lent. At the trial, the defendant proved a set-off for 6*l.* 10*s.* The undersheriff thereupon directed the jury to return a verdict for the defendant: *Held*, that this was a misdirection on the part of the undersheriff, and a rule for a new trial which had been obtained, was made absolute.

✓ (a) 2 C., M. & R. 559.

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that the plaintiff could not recover less than the whole, doubtless a special plea of payment was also entire; and if the full amount was not proved to be paid, the plaintiff was entitled to a verdict; but since it has been established by several cases, that the demand in such actions is divisible, and the plaintiff may recover less, and since, several contracts may certainly be included in a demand of one sum in an action of debt on simple contract, as well as indebitatus assumpsit, and since a plea of payment, whether pleaded to a declaration in one form of action or the other, must have the same meaning, and does not of necessity import that one entire sum was paid at one time, we do not see any satisfactory reason why it may not be considered capable of being severed in one case as well as the other, whether pleaded to the whole declaration, or, as in the present case, to part." It is not usual to execute a writ of inquiry in an action of debt, but it may be done as in an action of assumpsit; *Arden v. Connell*(a).

Bovill, in support of the rule, referred to *Rodgers v. Maw* (b).

PER CURIAM (c). The rule must be absolute for a new trial.

Rule absolute.

(a) 5 B. & A. 885.

(b) *Ante*, vol. 4, p. 66; S. C. 15 M. & W. 444.

(c) *Pollock*, C. B., *Alderson*, B.,

Rolfe, B., and *Platt*, B.



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BROMAGE and Another v. LLOYD and Another.

10. & 11. R. 32.

ASSUMPSIT. The declaration stated, that the defendants, on, &c., made their promissory note in writing, and thereby jointly and severally promised to pay one H. Lloyd Harries (since deceased), or order, 300*l.* on demand, and then delivered the said note to the said H. L. Harries, who then indorsed the said promissory note, but without making any delivery thereof; and afterwards the said H. L. Harries died, having first made his last will and testament in writing, duly executed and attested as by law required, and thereby appointed his then wife Jane Harries, executrix thereof, who after the death of the said H. L. Harries, duly proved the said will, and took upon herself the execution thereof, and she as such executrix afterwards for good and valid consideration to her as such executrix as aforesaid, transferred the said note, so indorsed as aforesaid, to the plaintiffs, to wit, by delivery thereof to them by her as such executrix as aforesaid; of all which the defendants then had notice, and then in consideration of the premises promised to pay the amount of the same note to the plaintiffs according to the tenor and effect thereof, and of the said indorsement and delivery. Breach, nonpayment.

A declaration stated that the defendants made their promissory note, and thereby promised to pay H. (since deceased), or order 300*l.*; that H. indorsed the note without making any delivery thereof; and that after his death his executrix transferred the note to the plaintiffs, to wit, by delivery thereof to them: *Held*, on general demurrer, that the plaintiffs had no title to sue on the note.

General demurrer and joinder.

The defendants' points for argument were, that no valid or sufficient transfer of the promissory note is averred or shewn, nor does it appear that the plaintiffs have any title to sue thereon.

Phipson, in support of the demurrer. The delivery of the note by the executrix to the plaintiffs, after the death of the testator, could not give the plaintiffs any title to sue on the note. In *Marston v. Allen* (a), it was held, that an indorsement meant two things, namely, the writing of the name of

(a) 8 M. & W. 494; S. C. 1 Dowl. 442, N. S. ✓

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the party transferring the bill on the bill, and a delivery for the purpose of completing such transfer. Here the writing by the testator of his name on the note, was a mere inchoate act, which could not be rendered complete by the subsequent delivery by the executrix. [*Platt, B.*—In *Rex v. Lambton* (a), *Wood, B.*, says, “It is clear that a special indorsement does not transfer the property in bills until they are delivered over”]. An indorsement of a bill by an executor does not bind the assets of the testator; *Childs v. Monins* (b): à fortiori a bare delivery by an executor without indorsement, will not transfer a title to sue on the note.

The Court called on

Keating to support the declaration. On general demurrer there is a sufficient allegation of an indorsement of the note. It is stated, that the executrix “transferred the note so indorsed to the plaintiffs, to wit, by delivery thereof to them by her as such executrix as aforesaid.” That allegation means a transfer in the only way in which a right to sue could be given, namely, by indorsement and delivery. [*Alderson, B.*—The promise is to pay according to the tenor and effect of the said indorsement, viz. a delivery by the executrix of a note, indorsed by the testator]. The videlicet does not control the operation of the word “transfer;” *Hammond v. Colls* (c). A “transfer” may mean either an indorsement or an assignment; the latter word is used in the statute 3 & 4 Anne, c. 9.

Secondly, the writing of his name on the note by the testator, and the delivery by his executrix, pass the property in the note, and entitle the plaintiffs to sue. If the testator had delivered the note without indorsement, the indorsement of the executrix would have reference to the delivery; *Watkins v. Maule* (d). [*Rolfe, B.*—In that case there was a delivery of the note for a valuable consideration, and that

(a) 5 Price, 428, 442.

(c) 1 C. B. 916; S. C. *ante*,

(b) 2 Brod. & Bing. 460; S. C. vol. 3, p. 164.

5 Moore, 282.

(d) 2 Jac. & W. 237.

created an equitable right, which entitled the holder to call on the executor for a formal transfer]. If a note is transferred without indorsement before bankruptcy, the holder may call on the bankrupt or his assignees to indorse it; *Smith v. Pickering* (a); *Arden v. Watkins* (b). In many instances an executor may adopt and ratify the debts of his testator; *Whitehead v. Taylor* (c).

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Phipson in reply. The word "transferred" does not mean that the note was indorsed and delivered. The true construction of the declaration is, that the defendants agreed to pay the amount of the note according to the delivery. (He was then stopped by the Court).

POLLOCK, C. B.—There must be judgment for the defendants. The writing by the testator of his name upon the note, and the delivery of it by his executrix after his death, do not constitute a legal and valid indorsement of the note, and the person to whom it is delivered, has no right to sue upon it.

ALDERSON, B.—I am of the same opinion. The words in the note "to order," mean an order in writing. Here the testator wrote his name, but made no order, the executrix gave an order, but not in writing. The two acts being bad, do not constitute one good act.

ROLFE, B.—The word "transferred" means by indorsement and delivery.

PLATT, B.—Concurred.

Judgment for Defendants.

(a) Peake's N. P. C. 50.
(b) 3 East, 317.

(c) 10 A. & E. 210; S. C. 2 P.
& D. 367.

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In re BILLING, Gent., one, &c., and in a cause between
BILLING and COPPOCK.

J.C. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14.

The defendant, a London attorney, employed the plaintiff, also a London attorney, to go to Cambridge and defend a person indicted for bribery at an election there. In 1841 and 1842, the plaintiff delivered to the defendant bills of costs unsigned, and in February 1847, he redelivered signed bills: *Held*, that the bills were taxable under 6 & 7 Vict. c. 73, s. 37.

M*MARTIN* moved for a rule, calling on the defendant to shew cause why an order of *Alderson*, B., referring the plaintiff's bills of costs for taxation should not be rescinded. It appeared from the affidavits that in June, 1841, the defendant, who was an attorney residing in London, requested the plaintiff, who was also a London attorney, to go to Cambridge and defend a person who had been indicted for bribery at the Cambridge election. The defendant promised the plaintiff that he should be liberally paid for his services. The plaintiff accordingly undertook the defence. In November, 1841, the plaintiff sent to the defendant a bill of costs in respect of the business done up to the end of October, amounting to 128*l.* 12*s.*; and in June, 1842, the plaintiff sent in the residue of his charges, amounting to 178*l.* 6*s.* 8*d.*; but neither bill was signed by him. The defendant not having paid the whole amount, although he had often promised that he would settle the claim, the plaintiff, in the month of February last, redelivered to the defendant copies of the bills of costs duly signed, and on the 16th of March commenced the present action. After the delivery of the declaration the defendant applied by summons to have the bills referred to the Master for taxation. This application was opposed, on the ground that the bills were not taxable, the work having been done by the plaintiff as agent of the defendant; and the case *In re Simons* (a) was relied on. It was also urged, that the bills were not taxable, having been delivered upwards of twelve months, and no "special circumstances" were shewn, as required by the 6 & 7 Vict. c. 73, s. 37. Mr. Baron *Alderson*, however, overruled the objections, and made the order which it was now sought to rescind.

(a) *Ante*, vol. 3, p. 156.

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First, the power of a Judge to refer an attorney's bill for taxation depends upon the 6 & 7 Vict. c. 73, s. 37, but it has been expressly decided that a bill for agency business is not taxable under that statute; *In re Gedye* (a); *In re Simons* (b). [Alderson, B.—How does it appear that the bill is for agency business? the charges are upon the usual scale, as between attorney and client]. *In re Simons* shews that when one attorney employs another under circumstances like the present, he employs him as an agent. In that case, the defendant, who was solicitor to the Post Office, employed the plaintiff, who was a country attorney, to conduct a prosecution for forgery, instituted at the suit of the Postmaster General. The bill did not charge the defendant as was usual in cases of agency business, and Coleridge, J., in his judgment, says, "Simons has indeed chosen to make the same charges on Peacock, as Peacock could make on the Postmaster General; thereby not sharing, but absorbing the whole of the profits. This is unusual; but this cannot alter the character of his service. It may be only a reason why a jury might upon a trial disallow some portion of his demand." [Pollock, C. B.—The case of *Weymouth v. Kripe* (c) decided that an agent's bill was, by the 12 Geo. 2, c. 13, exempted from the operation of the 2 Geo. 2, c. 23. As, therefore, it required a new statute to take agency bills out of the operation of the 2 Geo. 2, c. 23, and as such bills are not excluded from the 6 & 7 Vict. c. 73, the intention of the Legislature evidently was, that the 6 & 7 Vict. c. 73, should have the same effect as the 2 Geo. 2, c. 23, and include agency bills].

Secondly, more than twelve months have elapsed since the original delivery of the bills, and there is no "special circumstance" to authorize the Judge to refer them for taxation under the 6 & 7 Vict. c. 73, s. 37. The defendant cannot object that the first delivered bills were unsigned, for signature was intended as a protection to the client, and the absence of it is no ground for disallowing the taxation; *In re Pender* (d).

(a) *Ante*, vol. 2, p. 915.

3 Scott, 764; 5 Dowl. 495.

(b) *Ante*, vol. 3, p. 156.

(d) 2 Phillips, 69.

(c) 3 Bing. N. C. 387; 8. C.

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[*Pollock*, C. B.—That case only decides that if a client chooses to make use of an unsigned bill, the attorney shall not object to its taxation, merely because it is not signed. The 37th section of the 6 & 7 Vict. c. 73, enacts, that no attorney shall recover his costs for business done until the expiration of one month after the delivery of a *signed* bill. Then follows a proviso for referring the bill for taxation, after which is a proviso that no such reference shall be ordered “after the expiration of twelve months after *such* bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or a Judge.” That refers to a *signed* bill (a). *Alderson*, B.—The subsequent delivery of a signed bill may be considered a “special circumstance” within the statute. The ordinary reading of the statute is, that the client may tax within twelve months after the delivery of a signed bill. The Lord Chancellor decided, in the case of *In re Pender* (b), that the statute has a more extensive operation, and that an unsigned bill may be taxed. Besides, here the Judge’s order is to tax the signed bills, which have been delivered within twelve months. *Rolfe*, B.—If it were not so, an attorney might elude taxation altogether, by first delivering an unsigned bill, and then delivering a signed bill, after the expiration of twelve months].

PER CURIAM (c).

Rule refused.

(a) Sed vide per Lord Chanc.
Cottenham, *In re Pender*, 2 Phillips,
74—76.

(b) 2 Phillips, 69.
(c) *Pollock*, C. B., *Alderson*, B.,
Rolfe, B., *Platt*, B.

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GRANT v. MACKENZIE.

S.C. 1 Feb 12-13.

A RULE had been obtained, calling on the defendant to shew cause why the taxation of costs in this case should not be reviewed, on the ground that the notice of taxation was insufficient. The notice was as follows :—

“Take notice, I shall attend to tax costs *to-morrow* at twelve. Dated, 23rd of February.” Signed, &c.

This notice was put through the door of the office of the plaintiff's attorney, between seven and eight o'clock in the evening of the 24th, there being no one at the office.

The plaintiff's attorney did not attend the taxation, which proceeded in his absence on the 25th.

Hunfrey now shewed cause. The notice was sufficient. It was the duty of the attorney to have a clerk in attendance at the office until nine o'clock to receive papers. If a clerk had been there, he would have immediately seen that there was only a mistake in the date.

Billing, in support of the rule. The notice is insufficient. It was not received by the clerk of the plaintiff's attorney until after the time fixed for the taxation, and then he supposed from the date that the taxation had already taken place. In *Benthall v. West* (a), where a notice of trial was served on the first day of Hilary Term, 1844, for trial at the second sittings in next Hilary Term, it was held, that it ought to be construed strictly as a notice of trial in the following year, and the cause having been tried in Hilary Term, 1844, in the absence of the defendant, the Court set aside the verdict. [*Alderson*, B.—In that case the notice was sensible]. Here the defendant's attorney has deceived the clerk by putting a wrong date to the notice.

A notice of taxation, dated 23rd February, for “*to-morrow*,” was put through the door of the office of the plaintiff's attorney between seven and eight o'clock in the evening of the 24th, no one being in attendance. The clerk on receiving it the next day, supposed from the date of the notice, that the time for taxation had passed: Held no ground for reviewing the taxation, and that the notice was sufficient.

b. 2d. 13.

(a) *Ante*, vol. 1, p. 599.

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POLLOCK, C. B.—The rule must be discharged. Under the particular circumstances of this case I think the notice was sufficient. The attorney should either have been himself at the place of business until nine o'clock, or he should have left some person there to receive papers. If that had been done, the party could not have failed to see that the notice was wrongly dated, and that the taxation would take place on the following day. The mistake has arisen from the misapprehension of the clerk, which would not have arisen had proper inquiries been made.

ALDERSON, B.—I think the defendant ought not to be placed in a worse situation, in consequence of the clerk being absent from the place of business. If he had been there he would have received the notice, and the notice being dated the 23rd, and delivered the 24th, could not have deceived him. He would naturally have asked the person serving it what it meant, and so would never have been led to imagine that the time for taxation had elapsed. In the case of *Benthall v. West (a)*, the date was a future date, and the literal interpretation of the notice did not necessarily destroy its effect.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

✓(a) *Ante*, vol. 1, p. 599.

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CARTER v. WORMALD.

1 C. 1. 24th 12-81.

ASSUMPSIT by indorsee against maker of a promissory note, dated the 29th of September, 1840, for payment of 522*l.* 10*s.* two months after date.

Plea: That the said promissory note was made by the defendant, and one R. G. Edwards, and not by any other person or persons whatever: that after the making of the note, and after the indorsement thereof to the plaintiff, and whilst the plaintiff held the same as such indorsee, the defendant and R. G. Edwards, who had been and then was the partner of the defendant, in the profession and practice of an attorney and solicitor, which he, the defendant, during that time, and then exercised and carried on, according to the form of the statute in that case made and provided, delivered to the plaintiff nineteen signed bills of fees, charges, and disbursements of them, the defendant, and R. G. Edwards, in a certain cause, being the cause herein-after mentioned, and other causes and matters, and there-upon afterwards, and after the delivery of the said signed bills, and every of them, and after the indorsement of the promissory note to the plaintiff, and whilst the plaintiff held such note as indorsee, and after the note was due and payable, according to the tenor and effect thereof, and before the commencement of this suit, to wit, on, &c., by a certain order then made by the Honourable Mr. Justice Williams, then being one of the justices of her Majesty's Court of Queen's Bench, in a certain action, then depending in the same Court, wherein the plaintiff herein was plaintiff, and one James Hieron was defendant, and which

To an action by indorsee against maker of a promissory note, the defendant pleaded that the note was made by himself and E., his partner; and that whilst the plaintiff was the holder of the note, the defendant and E. delivered to him nineteen signed bills of costs, which were referred to taxation: that it was agreed that the balance found due from the plaintiff to the defendant and E., on such taxation, should be applied in part payment of the note, and that the balance of the note, with interest, should be secured by a judgment, payable at certain periods, which had elapsed before the commencement of the suit: that the taxation was

still pending, and the balance not ascertained: and that the defendant and E. had always been ready and willing to apply the balance due to the defendant towards the payment of the note, and on completion of the taxation, to secure the balance due on the note by a judgment in accordance with the agreement: *Held* bad on demurrer, as even supposing it to be a good agreement to suspend the remedy, the lapse of time shewed the performance of it to be impossible.

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order bore date, &c., upon the hearing of the attornies and agents on both sides, it was ordered that the said nineteen signed bills of fees, charges, and disbursements, should be referred to the Master to be taxed (Mr. John Brooks having undertaken to pay what, upon such taxation, might appear to be due), that the defendant and R. G. Edwards should give credit for all sums of money by them received from or on account of the plaintiff, and also for rent then due to the plaintiff, and for all sums of money properly paid by the plaintiff to Mr. John Brooks, on account of some of the said bills of costs; and that the defendant and R. G. Edwards should refund what (if anything) they might on such taxation appear to have been overpaid; and by consent it was thereby further ordered, that upon payment by the said John Brooks, or refunding by the defendant and R. G. Edwards (as the case might be), the defendant and R. G. Edwards should deliver up to the plaintiff all deeds, books, papers, and writings, in their possession, custody, or power, belonging to the plaintiff. And the defendant further saith, that the said Mr. John Brooks then gave the said undertaking for and on behalf of the plaintiff, and at his request, and for his benefit; and that afterwards, and after the date and making of the said order, and whilst the plaintiff held the promissory note as such indorsee, and before the commencement of this suit, to wit, on, &c., it was agreed by and between the plaintiff and the defendant and the said R. G. Edwards, that the balance (if any) found due from the plaintiff to them, the defendant, and R. G. Edwards, upon the taxation of the costs under the said order, should be applied in part payment of the said promissory note, and that the balance of the said promissory note, with interest, should be secured by a judgment for 50*l*. and interest thereon, payable on the 20th day of November then next (and which elapsed before the commencement of this suit), and a moiety of the balance and interest on the 24th day of March, 1842, (and which had

also elapsed before the commencement of this suit) and the remainder with interest on the 24th day of June, 1842, (and which had also elapsed before the commencement of this suit.) And the defendant further saith, that the taxation of costs under the said order was afterwards, and after the making of the said agreement, and before the commencement of this suit, to wit, on, &c., proceeded with in pursuance of the said order, and such taxation at the commencement of this suit was, without the default or laches of the defendant, and the said R. G. Edwards, or either of them, and still is pending and incomplete, and no allocatur was, at the commencement of this suit, given upon such taxation, nor has yet been given thereupon or thereunder, nor had it at the commencement of this suit, nor has it hitherto been discovered or ascertained, or signified in any way whatsoever, whether any or what balance was or is due from the plaintiff to the defendant and R. G. Edwards, upon the taxation of the aforesaid costs, under the aforesaid order, in respect of the said nineteen bills of fees, charges, and disbursements, or any of them, or in respect of the charges and items contained in them, or any or either of them; that the defendant and R. G. Edwards respectively, always, from the time of the date and making of the said agreement until the commencement of this suit, hitherto have been and were, and are ready and willing to permit and allow the application of the balance (if any) found due from the plaintiff to the defendant and R. G. Edwards, upon the taxation of the costs aforesaid under the said order, in and towards payment of the said promissory note, and the amount thereof, with interest as aforesaid; that the defendant and R. G. Edwards respectively always, from the time of the making of the said agreement until the said 20th day of November in the said agreement mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount of the balance of the said promissory note, with interest as aforesaid, by a judgment

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payable as in the said agreement mentioned, according as, on such taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid; and that the defendant and R. G. Edwards respectively always, from the said 20th day of November in the said agreement mentioned, until the 24th day of March in the said agreement also mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount or balance of the said promissory note, with interest as aforesaid, according as on the said taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid, by a judgment for 50*l.* and interest thereon payable immediately, and a moiety of the balance and interest thereon, on the 24th day of March, in the said agreement mentioned; and that the defendant and R. G. Edwards respectively always, from the 24th day of March in the said agreement mentioned, until the 24th day of June in the said agreement also mentioned, were ready and willing, upon the said taxation being completed, to secure the full amount or balance of the said promissory note, with interest as aforesaid, according, as on the said taxation being completed, a balance should or should not appear to be due from the plaintiff as aforesaid, by a judgment for 50*l.* and interest thereon, and a moiety of the balance and interest thereon payable immediately, and the remainder with interest, on the 24th day of June in the said agreement mentioned; and that the defendant and R. G. Edwards always, from the said 24th day of June in the said agreement mentioned, until the commencement of this suit, and hitherto have been and were and are ready and willing, upon the said taxation being completed, to secure the full amount, or the balance of the said promissory note, with interest as aforesaid, according as, on such taxation being completed, a balance should or should not appear to be due to the plaintiff as aforesaid, by a judgment for the full and whole amount thereof, payable immediately;

and that the defendant and the said R. G. Edwards have respectively always, from the making of the said agreement until the commencement of this suit, and hitherto been ready and willing in all things on their part and behalf to perform and fulfil, and have in all things on their part and behalf performed and fulfilled the said agreement, of all which the plaintiff during all that time had notice. Verification.

Special demurrer, assigning for cause that the matters alleged in the plea amounted to an accord only, without satisfaction, and that it confessed the cause of action in the first count, without shewing anything in avoidance of it.

Butt, in support of the demurrer. The plea is bad. If it is meant to be a plea of accord and satisfaction, it affords no answer, for it only shews an accord partly executed. If the agreement in point of fact amounted to a satisfaction, it should have been so pleaded. The averment of the plaintiff's readiness and willingness to perform the terms of the agreement will not excuse the want of performance. In *Com. Dig.* tit. "*Accord*" (B 4), it is said, "So an accord must be executed, otherwise there will be no remedy for a nonperformance: and, therefore, an accord to pay money in satisfaction is not good, if he shews only that he is ready to pay; but he ought to say, that he has paid it; 1 *Rol.* 129, l. 25; *R. 1 Lea.* 19." Neither is part performance sufficient. Again (B 4), "so if he does not shew it to be perfectly executed; *R. Dy.* 75 b, 356 a; *Pl. Com.* 5, 9 C. 79, b 2. As if an accord be to do two things, and he shews only one of them performed; 1 *Rol.* 129, l. 12; 1 *Rol.* 471, l. 10; *R. Cro. Car.* 193; *vide Dyer*, 356, a. So if an accord was to pay money and an attorney's bill, and he shews that he had paid the money and was ready to pay the bill, but never had it; *R. Ray.* 203; 1 *Mod.* 69; 2 *Keb.* 690." "To pay money, and to give counsel on request, and that he was not requested; *Bro. Accord*, 7." An accord must be executed before the commencement of

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the suit; *Com. Dig.* tit. "Accord" (B 4). (He was then stopped by the Court).

Atherton, contra. The agreement is not pleaded by way of satisfaction, but only in suspension of the suit. It is not an accord within the rule which requires satisfaction to make a good plea in bar. An accord of that nature must in terms stipulate for satisfaction, and it is conceded that such an agreement unexecuted could not be pleaded in bar. The examples cited in *Comyn's Digest* support this view. In every instance the accord, if carried out, would terminate in satisfaction. This agreement being founded on a good consideration, it is a violation of it to bring the present action. The plea, therefore, operates by way of suspension of the suit; *Com. Dig.* tit. "Accord" (B 4); *Allen v. Harris* (a). It is good in form, and shews that the action has been brought too soon. The case is similar in principle to that of *Stracy v. The Bank of England* (b). There certain stock of the plaintiffs was transferred under a forged power of attorney. The Bank of England offered to replace the stock if the plaintiffs would first prove the amount under a commission of bankruptcy issued against a firm, in which the forger of the power had been a partner; after this offer the plaintiffs received a dividend, and engaged to tender a proof of their demand under a commission of bankruptcy; and it was held that the plaintiffs could not sue the Bank in respect of the stock, until they had fulfilled their engagement to tender the proof under the commission of bankruptcy. The grounds on which that decision rested were, first, that the action was brought against good faith; and, secondly, that the defendants had a right to avail themselves of the agreement to prevent circuity of action. *Tatlock v. Smith* (c) is to the same effect. *Simon v. Lloyd* (d)

(a) 1 Ld. Raym. 122.

& P. 676.

(b) 6 Bing. 754; S. C. 4 M. & P. 639.

(d) 2 C., M. & R. 187; S. C. 3 Dowl. 813.

(c) 6 Bing. 339; S. C. 3 M.

was an action for goods sold, and the defendant pleaded as to 9*l.* 15*s.* 9½*d.*, that after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew upon a piece of paper, having a bill of exchange stamp upon it of 1*s.* 6*d.*, an instrument purporting to be a bill of exchange without a drawer's name thereto, whereby the defendant was required to pay to such person or his order, who should place his name thereto as drawer, 20*l.* two months after date, as for value received, which instrument the plaintiff requested the defendant to accept towards payment and satisfaction of the said sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest, and which the defendant accepted accordingly and delivered to the plaintiff, and thereby became liable to pay to the plaintiff, or to such person as should place his name thereto as drawer, or his order, the sum of 20*l.*, viz., towards payment of the sum of 9*l.* 15*s.* 9½*d.*, and for the plaintiff's accommodation as to the rest, and that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.* 15*s.* 9½*d.*, and which bill was not due at the time of the commencement of the suit. On demurrer to the replication it was held, that as the bill remained unnegotiated in the hands of the plaintiff without any drawer's name to it, and unpaid, under the circumstances alleged in the plea, the plaintiff's right to sue on the original debt was suspended. *Parke, B.*, there says, "the defendant, by putting his name to this paper as the acceptor, entered into a promise to pay the bill, which he cannot now get rid of, and gave an irrevocable authority to put to it the name of any person as a drawer, by which he has rendered himself liable for the amount. That is a valuable consideration for an agreement by the plaintiff that his right to sue should be suspended. It is, in effect, an agreement not to sue for a certain time, in consideration of receiving an authority to use the defendant's name for a certain amount, during the period of two months." [*Alderson, B.*—Granting that it may be a

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good agreement to suspend the remedy, the question is, whether the lapse of time has not made the performance of it impossible. The judgment cannot be signed now.] It is averred that the defendant has always been ready and willing to perform his part of the agreement.

PER CURIAM (a).—We think the plea is bad, and there must be judgment for the plaintiff.

Judgment for Plaintiff.

(a) *Pollock, C. B., Alderson, B., and Platt, B.*

COURT OF COMMON PLEAS.

Trinity Term.

IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

SHARLAND v. LEIFCHILD.

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ASSUMPSIT. The declaration stated, that before the making of the agreement thereafter mentioned, the defendant put up for sale, by public auction, divers dwelling-houses, &c., situate, &c., upon and subject to certain conditions of sale. It then set out, among others, one, "that the vendor should deliver an abstract of title to the purchaser, or his or her solicitor, who should examine the same with the original deeds at Chelmsford, &c., as by the said conditions, reference being thereunto had, will more fully and at large appear." It was then alleged, that at the said sale the plaintiff was declared, and it was agreed between the plaintiff and the defendant, that the plaintiff should become, the purchaser, subject to the said conditions.

In a declaration in assumpsit by vendee against vendor for the non delivery of an abstract of title, one of the conditions of sale set out was, "that the vendor would deliver an abstract of title to the purchaser."

Plea, that it was part of the contract that the defendant should deliver an abstract com-

mencing with a certain conveyance, dated 1843 only, and not be required to shew any previous title, and that he did furnish such an abstract: *Held*, on special demurrer, to be bad, as amounting to the general issue.

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The declaration then averred that the plaintiff had performed the before mentioned conditions, and that although a reasonable time had elapsed for the defendant causing to be delivered to the plaintiff an abstract, shewing such good and sufficient title to the said dwelling-houses, with the appurtenances, as, according to the said conditions of sale, the plaintiff was entitled to require to be shewn by the abstract therein mentioned to be delivered by the vendor; yet that the defendant had not caused to be delivered to the plaintiff, or any solicitor of the plaintiff, any abstract, shewing such a good and sufficient title to the said dwelling-houses, with the appurtenances, as the plaintiff was, according to the said conditions of sale, entitled to require to be shewn by the abstract therein mentioned so to be delivered by the vendor; and the plaintiff says, that the defendant, after the making of the said agreement and promises, to wit, on the day and year last aforesaid, delivered to the plaintiff, as and for an abstract shewing such a good and sufficient title to the said dwelling-houses, with the appurtenances, as the plaintiff was, according to the said conditions of sale, entitled to require to be shewn by the abstract therein mentioned so to be delivered by the vendor, an abstract which did not shew such a good and sufficient title to the said dwelling-houses, with the appurtenances, as, according to the said conditions of sale the plaintiff was entitled to require to be shewn by the abstract therein mentioned to be delivered by the vendor, but which, on the contrary thereof, shewed a less good and less sufficient title.

Plea. That at the time of the making of the said promise of the defendant in the said first count mentioned, it was agreed between the plaintiff and the defendant, as part of the contract in the first count mentioned, that the defendant should duly deliver an abstract of his title to the said dwelling-houses, with the appurtenances, commencing with a certain deed of conveyance from H. Bosanquet, Esq.,

to Mr. A. Markwick, dated 24th of August, 1843 only; but that he, the defendant, should not be required to furnish any other abstract, and by no means to go into any previous title or evidence thereof, notwithstanding the deeds or documents relating to the prior title might be mentioned, and covenanted to be produced in any abstracted deed. And the defendant says that he did, within a reasonable time in that behalf, to wit, on the 10th of December, A. D. 1845, deliver to the plaintiff's solicitor an abstract of his, the defendant's, title to the said dwelling-houses, with the appurtenances, commencing with the said deed of conveyance, and which abstract shewed a good and sufficient title in that behalf to the said dwelling-houses, with the appurtenances, commencing with the said deed of conveyance. Verification.

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Special demurrer, on the ground, among others, that the plea was an argumentative traverse, and that it amounted to a plea of the general issue.

Peacock (with him *T. Jones*) in support of the demurrer. The principal question in this case is, whether the plea does not deny, in an argumentative manner, the contract alleged in the declaration. The allegation in the declaration that the defendant "would deliver an abstract of title to the purchaser, or his or her solicitor," must mean that the vendor was bound to shew a good title to the property put up for sale. He would, in order to recover in an action against the vendee for not completing the purchase, be bound to shew that he was prepared to deliver an abstract of such a title. In *Souter v. Drake* (a) it was held, that in every contract for the sale of an existing lease, there is an implied undertaking by the seller (if the contrary be not expressed) to make out the lessor's title to demise, and without shewing such title, the seller cannot maintain an

✓(a) 5 B. & Ad. 992; S. C. 3 N. & M. 40.

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action at law against the buyer for refusing to complete the purchase. If that was the case in the instance of a lease, à fortiori was it so in the case of a sale of the freehold. In conformity with this view is the judgment of *Parke, B.*, in *Doe d. Gray v. Stanion (a)*. There his Lordship says, "in the first place, in contracts for the sale of real estate, an agreement to make a good title is always implied." The plea, however, does not admit the contract as alleged in the declaration, but sets up another, by which he, the defendant, would be bound to prove only a title from the year 1843. It amounted, therefore, to an argumentative denial of the contract as alleged in the declaration, and was therefore bad. In *Jones v. Nanney (b)*, which was an action of assumpsit for the work and labour of the plaintiff as an attorney, the defendant pleaded as to all but 90*l.* that the work and labour were performed by the plaintiff in endeavouring to secure the defendant's return to Parliament on two occasions, under an agreement, on the first occasion, that the plaintiff should receive no remuneration, but only his disbursements; and that no express contract was made between the plaintiff and defendant on the second occasion; and that £90 was a fair remuneration for the plaintiff's services on that occasion. The Court held the plea to be bad, as amounting to the general issue. In *Whittaker and Others v. Mason (c)*, to a breach of contract in not paying for books sold and delivered, by bills at certain dates, with security for their being honoured, the defendant pleaded a custom in London, that, upon such sales, the security need not be given unless required when the books are delivered, and that the plaintiffs did not require it at the time: the Court there held that the plea did not admit the contract and offer an excuse for not performing. So in *Brind v. Dale (d)*, where the action was against a carrier to recover

✓(a) 1 M. & W. 695, 701.

✓(c) 2 Bing. N. C. 359; S. C.

✓(b) 5 Dowl. 90; S. C. 1 M.
 & W. 333.

2 Scott, 567.

(d) 2 M. & W. 775.

the value of goods alleged to have been lost by his negligence, it was held that a plea setting up a condition on which the goods were accepted, that the plaintiff should accompany the cart and protect the goods, was held bad, as amounting to the general issue. And in *Nash v. Breeze* (a) it was held, that a plea qualifying the contract stated in the declaration, by introducing a new stipulation, was bad, as amounting to the general issue, although it only set out what was the actual agreement between the parties. With respect to the case of *Smart v. Hyde* (b), which might be cited in support of the plea, it will, on examination, appear to be an authority not inconsistent with the cases already quoted. That was an action for a breach of warranty that a mare was sound, and the plea was that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which were, that "a warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the meantime a notice and certificate of unsoundness were given," that the sale took place subject to those rules, and that the same were agreed to by the parties, and that such notice and certificate were not given within the time limited. The Court of Exchequer there held the plea to be good in point of form, and not amounting to the general issue. There *Parke*, B., in delivering his judgment, observed, "that every word of this plea is consistent with the contract stated in the declaration." The present case, however, is clearly distinguishable, for the plea here seeks to modify the contract alleged in the declaration; while in *Smart v. Hyde* it only alleged a collateral matter, for the purpose of shewing that the plaintiff was not entitled to recover.

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Couch, in support of the plea. The present plea does

✓(a) 11 M. & W. 352; S. C. 2 Dowl. 1015, N. S.

✓(b) 8 M. & W. 723; S. C. 1 Dowl. 60, N. S.

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not, according to the authority of *Smart v. Hyde* (a), amount to the general issue. The rules there mentioned in the plea must be considered as part of the contract, and the Court having, notwithstanding, decided the plea to be valid, that case must be considered as an authority for the defendant. [Maule, J.—That case appears to have been decided on the principle that the rules constituted something extrinsic to the contract in the declaration alleged. In the present case, however, the plea expressly alleges a restriction, as to the period for which a title should be required, to have been treated “as part of the contract.” It cannot, therefore, be treated as a collateral matter.] The meaning of the plea is, that there was a collateral agreement between the parties that the vendor should deliver this particular abstract. If it was collateral, then the plea could not be bad as an argumentative denial of the contract alleged in the declaration. The case of *Parker v. Palmer* (b) is an authority to that effect. There the declaration stated that the defendant bargained for and bought of the plaintiffs a quantity of East India rice, according to the conditions of sale of the East India Company, to be put up at the next East India Company’s sale by the proprietors, if required, at a certain price there mentioned. The proof was, that besides these conditions, the rice was sold “per sample.” This was held to be no variance, as the words “per sample” were not a description of the commodity sold, but a collateral engagement that it should be of a particular quality. There, Abbott, C. J., observed, “the words ‘per sample,’ introduced into this contract, may be considered to have the same effect as if the seller had, in express terms, warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Now if there had been such an express warranty in this case, I should be of opinion that the plaintiff would not be bound

✓(a) 8 M. & W. 723; S. C. 1 Dowl. 60, N. S.

✓(b) 4 B. & A. 387.

to set it out in his declaration, for he is only bound to set out the contract for the breach of which he declares. The words 'per sample' are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality; the breach of that engagement may furnish a matter of defence to the defendant, but the plaintiff does not rely on it, and need not state it in his declaration." So in *Sieveking v. Dutton* (a), the plaintiff declared on an agreement, whereby it was contracted that the plaintiff should supply, and the defendant receive, certain bales of wool, and alleged as a breach the refusal of the defendant to receive; plea, that the wool contracted for was to be according to sample, but the wool tendered was inferior to the sample. This Court there held that the plea was good, and did not amount to non assumpsit. [Wilde, C. J., referred to *Meyer v. Everth and Another* (b). Maule, J.—The plea in *Sieveking v. Dutton* does not vary the substance of the contract. The defendant particularizes a certain sort of wool as the subject of the contract, which he says was sold by sample, which in fact amounts to a warranty. It is quite consistent with the statement of the contract in the declaration that there was a warranty given by the plaintiff; so that the defendant admitted the contract, but sought to avoid the effect of it.] Here the plea no more seeks to qualify the contract with reference to the abstract to be delivered, than the plea there qualified the contract as to the wool.

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Peacock, in reply. The cases of *Parker v. Palmer*, and *Sieveking v. Dutton*, only decided that it was not necessary to set out the collateral contract into which the plaintiff had entered, and, consequently, that it was competent for the defendant to set that collateral contract up in his plea, because it did not alter the contract of the defendant into which the declaration alleged him to have entered. Here, however,

(a) *Ante*, vol. 4, p. 197; S. C. 3 C. B. 331.

(b) 4 Campb. 22.

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the defendant seeks to limit the contract as alleged by the plaintiff. It therefore sets up a different one, and, consequently, amounts to non assumpsit. The legal effect of the contract as set out in the declaration is, that a good abstract of title shall be delivered; the effect of the plea is to shew that no such contract was entered into. It is similar to the case of an action on a covenant to repair, which means to repair all matters; and which, consequently, would not be proved by shewing a covenant to repair "fire excepted." The effect of the case of *Smart v. Hyde (a)* is the pleading of one contract against another, and not an alteration of the contract itself declared on by the plaintiff. Here, the defendant sought to alter the contract on which the plaintiff relied, and, therefore, the plea was bad.

WILDE, C. J.—I am of opinion that there must be judgment in this case for the plaintiff, the plea being bad, as amounting to an argumentative denial of the contract alleged in the declaration. It seems to be admitted in the argument, that the condition of sale mentioned in the declaration, of an abstract to be delivered, means an abstract shewing good title to the interest sold,—that is, a freehold interest. That being the meaning of the condition set out, the question is, whether the plea is a denial of the promise afterwards alleged in the declaration. It is said in the plea that the contract was not to deliver in the sense alleged in the declaration, but that the plaintiff engaged to deliver an abstract commencing in 1843. The effect of that is to say, that "the promise I made was a promise different from that mentioned in the declaration." Now it is a well known rule, that if the defendant means to answer an action, he must do it in direct terms, and not circuitously. Whenever, therefore, a plea to a declaration can be understood to state certain facts as a denial of the promise alleged, it is bad for argumentativeness. Now it is perfectly clear, in

✓ (a) 8 M. & W. 723; S. C. 1 Dowl. 60, N. S.

many cases, that the declaration need not set out all the terms and conditions of the contract on which the plaintiff-sues. In the case of *Sieeking v. Dutton* (a), the declaration was for wool of a general description, which was merchantable. That left it open to shew on either side that it was of a particular description. It was, therefore, competent for the defendant to say "true you have sold me certain bags of wool, but they were of a different description from those that were delivered, and, therefore, you are not entitled to recover." The defence, therefore, is consistent with the allegations in the declaration. But here the abstract alleged in the plea to have been required, is a different one from that alleged in the declaration. I am therefore of opinion that the plea is bad as an argumentative denial of the contract alleged in the declaration; and therefore, that judgment ought to be given for the plaintiff.

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COLTMAN, J.—I am of the same opinion. I can put no meaning on the words in the declaration except that an abstract of a good title was contracted to be delivered by the defendant. When, therefore, a title of a qualified description, beginning with the year 1843, is alleged in the plea as the one which the defendant had undertaken to deliver, it does, according to the rule laid down in the cases, amount to the general issue. In the case of *Smart v. Hyde*, it seems to me that the Court arrived at a satisfactory solution of the difficulty arising in that case, for the Court there treated the rules as forming matter collateral to the contract as alleged in the declaration. That case, therefore, was well decided. It was considered as admitting both the promise and the breach, but setting up an excuse for breaking the contract. It is clear to me, that by our decision we do not interfere with those cases, and that the plaintiff is entitled to judgment.

/(a) *Ante*, vol. 4, p. 197; S. C. 3 C. B. 331. ✓

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MAULE, J.—It seems to me that this plea is an indirect and circuitous denial of the promise alleged in the declaration. The declaration states that the condition into which the defendant entered was to deliver an abstract of title. The plea alleges that the title was to commence in the year 1843, and that the defendant was not to produce any other abstract than the one there alleged. That is inconsistent with the one alleged in the declaration. It differs in being an abstract commencing at a later time, and also with a particular deed. The defendant, therefore, states in his plea a contract which could not co-exist with that stated in the declaration. He, therefore, denies that by inference which he should have denied directly. The case of *Smart v. Hyde* (a) is of a peculiar description, as the parties seem there to have agreed upon a particular law as to taking advantage of the breach of warranty. The Court there treated the rules of the repository as collateral to, and not a denial of, the contract alleged, and therefore considered the plea not as traversing or denying the allegations in the declaration. The cases of *Parker v. Palmer* (b), and *Sievehing v. Dutton* (c), proceeded on the same principle. In the present case, however, the defendant has, by his plea, circuitously denied the contract alleged in the declaration.

CRESSWELL, J.—I agree with the rest of the Court. This plea, there can be no doubt, is a circuitous denial of the contract in the declaration alleged.

Judgment for the Plaintiff

✓(a) 8 M. & W. 723; S. C. 1 Dowl. 60, N. S.
 ✓(b) 4 B. & A. 387.
 ✓(c) *Ante*, vol. 4, p. 197; S. C. 3 C. B. 331.

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WRIGHT v. HUTCHINSON.

J.C. 4. Ch. 569.

ASSUMPSIT. The declaration contained a count on a bill of exchange by indorsee against the acceptor, and also a count on an account stated.

A plea of the defendant's discharge under the 5 & 6 Vict. c. 116, should either set out the proceedings in conformity with sect. 4, or describe them as in sect. 10 of that statute. ✓

Plea. That after the making of the said several contracts and promises, and the accruing of the causes of action, and each of them, in the declaration mentioned, the defendant, not being a trader within the meaning of the statutes in force relating to bankrupts at the time of the making and passing of the act of Parliament hereinafter mentioned, and having resided twelve calendar months within the London district, under and by virtue of and according to the directions and provisions of a certain statute, made and passed in the session of Parliament held in the 5th and 6th years of the reign of our Lady the now Queen, intituled, "An Act for relief of Insolvent Debtors," duly presented her petition for protection from process in the Court of Bankruptcy in London, which said petition was forthwith afterwards, to wit, on the day and year last aforesaid, filed of record in the said Court of Bankruptcy. And the defendant further says, that such proceedings were had in the said Court of Bankruptcy, upon the said petition of the defendant; that afterwards, and before the commencement of this suit, to wit, on the same day and year aforesaid, a final order was made by Joshua Evans, Esq., then being one of the commissioners of the said Court of Bankruptcy, duly authorized in that behalf for the protection of the person of the defendant from all process, and for the vesting of the estate and effects of the defendant in Alexander Brymer Belcher, one of the official assignees of the said Court of Bankruptcy; whereby and by force and virtue of which said order the defendant was discharged of and from the several contracts, and promises and causes of action, and each of them, in the declaration mentioned.

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And the defendant further saith, that the said order and discharge still remain in full force. Verification.

Demurrer, on the ground, among others, that the defendant, in her plea, neither follows the words of the 10th section of the 5 & 6 Vict. c. 116, (stating that a final order was made for protection and distribution), nor does it state the particulars requisite to bring the defendant within the operation of the act.

Channell, Serjt., in support of the demurrer. This is a defective plea, as it neither describes the proceedings for the discharge of the defendant in conformity with sect. 4, nor does it describe the order for the defendant's discharge in the language of sect. 10. The case of *Leaf v. Robson* (a) is precisely in point. There it was held that such a plea was bad, in neither following strictly the words of sect. 10, nor in shewing all the requisites described in sect. 4. The case of *Gillan v. Deare* (b) is to the same effect. *Cook v. Henson* (c), and *Nicholls v. Payne* (d), recognise the same principle.

Unthank, in support of the plea. In pleading such a plea as the present, a difficulty may be imposed upon the defendant in pleading the facts existing in the present case, because no creditors' assignee has yet been chosen, and it is found difficult to induce a person who is willing to undertake the office. The consequence would be, under those circumstances, that the defendant would be deprived of the benefit of his discharge. [*Maule*, J.—The defence is, I presume, the proceedings which have taken place under sect. 4. There can, consequently, be no difficulty in pleading such discharge by setting forth the proceedings, or by describing the final order in the manner provided by

✓(a) *Ante*, vol. 2, p. 646; S. C. 13 M. & W. 651.

✓(b) *Ante*, vol. 3, p. 412; S. C. 2 C. B. 309.

✓(c) *Ante*, vol. 3, p. 177; S. C. 1 C. B. 908.

✓(d) *Ante*, vol. 2, p. 629; S. C. 7 M. & G. 927; 8 Scott, N. R. 732.

sect. 10.] If the words used in the plea are equivalent in substance to those employed in the statute, that is sufficient. Although a form is given by a statute, it is not necessary in all cases to follow it literally. In the 7 & 8 Vict. c. 96, s. 22, the word "distribution" does not occur, nor in the schedule attached to that section is it to be found.

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WILDE, C. J.—The plea in the present case is under the 5 & 6 Vict. c. 116. There can be no difficulty in framing it properly. Either it should set forth the petition and other proceedings in conformity with sect. 4, or describe the order in the form directed by sect. 10.

PER CURIAM.

Leave to amend, otherwise judgment for the Plaintiff.

J. J. HARGRAVE, by his next friend and mother,
M. Hargrave v. HARGRAVE and Others.

SC. 4. CB. 640

PULLING moved for a rule to shew cause why the plaintiff should not be at liberty to cross-examine vivâ voce on oath, before the commissioners, on the commission directed to be issued by an order of the Master of the Rolls, on the 1st of December, 1846, B. H. T., a witness, on the part of the defendants, residing at Boulogne, such cross-examination to take place at the same time and place with the examination under the said commission, and why the cross-examination and answers should not be reduced into writing, and returned with the commission; or why a commission should not issue out of this Court for the cross-examination of the said B. H. T., such cross-examination to take place at the time and place of executing the said

Where the Court of Chancery had directed an issue to be tried in this Court, and also directed that a witness then abroad should be examined on interrogatories, this Court refused to vary the order of the Court of Chancery, by directing that the plaintiff should be at liberty to cross-examine

the witness, vivâ voce, before the Chancery commissioner; or to issue a separate commission to cross-examine the witness under 1 Wm. 4, c. 22, s. 4.

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commission out of Chancery; and why the defendants' attorney should not, within four days previous to the execution of the commission, furnish the plaintiff's attorney with a copy of the interrogatories to be administered to the said B. H. T., on the part of the defendants.

It appeared, from the affidavit on which the application was founded, that in the present suit, which was instituted before the Master of the Rolls, that learned Judge had directed an issue to be tried in this Court, in order to determine the legitimacy of the plaintiff. It had already been tried once, and, previous to the trial, a commission had issued out of this Court, directed to certain commissioners at Boulogne, to examine several witnesses *vivâ voce* on the part of the defendants; among them was a person named Betsy Head Tune. On the execution of that commission Miss Tune refused to give evidence. At the trial, a verdict was found in favour of the plaintiff, and on application to the Master of the Rolls, his Lordship directed a new trial, and that a commission should issue to examine Miss Tune on interrogatories. His Lordship, however, refused an application at the instance of the plaintiff to cross-examine the witness *vivâ voce*, on the ground that he had no power to deviate from the mode of examination usual in such cases in the Court of Chancery. Subsequently an application similar to the present was made to *Williams, J.*, at Chambers; this, however, his Lordship declined to grant, but permitted it to be made to the full Court.

The present application was made under the fourth section of the 1 Wm. 4, c. 22, whereby the superior Courts of common law are empowered "to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein the action shall be

depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just." In the case of an ordinary action, where an order had been made at the instance of one party for examination of witnesses, on interrogatories, at Paris and Boulogne, this Court granted a rule empowering the opposite party to cross-examine *vivâ voce*; *Pole v. Rogers* (a). This Court had the same power over an issue out of Chancery as in an ordinary action with respect to the examination of witnesses; *Bourdeaux v. Rowe* (b). Would then the circumstance of the Court of Chancery having already interfered, vary the case? In the case of an issue from Chancery, the ordinary jurisdiction of the Court of Chancery as to the examination of witnesses abroad, and that exercised by Courts of law under the 1 Wm. 4, c. 22, s. 4, are concurrent. In *Grinnell v. Cobbold* (c), the Court of Chancery, after a common law commission to examine *vivâ voce*, directed an examination on written interrogatories to be substituted. The present was a case peculiarly calling for this Court's interference. An English witness who had already avoided a *vivâ voce* cross-examination, was about to give evidence under written interrogatories, and the Court of Chancery, which had directed that mode of examination, appeared to have no power to substitute any other. If, however, this Court would not interfere with the commission issued by the Court of Chancery, it clearly had power to issue a new commission, and such a commission might go for the purpose of cross-examining the witness; *Campbell v. Scougal* (d).

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WILDE, C. J.—I do not see how the plaintiff can get what is asked for by this rule. A commission to examine witnesses has been sued out of the Court of Chancery,

(a) 4 Scott, 479; S. C. 3 Bing. 1 Scott, 608.
N. C. 780; 5 Dowl. 632. (c) 4 Sim. 546.
✓(b) 1 Bing. N. C. 721; S. C. (d) 19 Ves. 552.

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and if any alteration is to be made in the terms of that commission, recourse must be had to the Court which issued it. This Court acts in assistance of the Court of Chancery, but it does not interfere with and control or amplify its orders. That Court was possessed of all the information necessary, and had authority to order a commission to issue with as extensive powers as the nature of the case required. Here the cause has been tried, and some witnesses residing abroad were examined and cross-examined under a commission issued by this Court; but in consequence of the refusal of another and most material witness to be examined, those proceedings have failed, a new trial has been granted by the Court of Chancery, and a commission issued by that Court to examine this particular witness. The Court of Chancery, then, has exercised its discretion after investigating the matter, and we are asked to order the witness to be examined in a way that Court omitted to do. It is said, that by the rules of practice of the Court of Chancery, no power can be obtained to cross-examine a witness *vivâ voce*, but only on interrogatories, which, in this particular case, are insufficient for the purposes of justice. But all the parties were before the Court of Chancery when the new trial was prayed for and granted. The powers of that Court are very extensive, and the parties might have been compelled to receive the boon they asked for on such terms as that Court thought equitable and expedient; and we cannot enter into a subject which they were competent to decide, and have decided. This rule asks, in the alternative, for powers to be granted to the plaintiff to cross-examine a particular witness before the Chancery commission, or for a commission to issue from this Court to cross-examine the same witness. But to issue a commission to cross-examine a witness is not consistent with the practice of this Court, and the former part of the rule, if granted, would be abortive in its result. We cannot impose upon the Chancery commissioners the obligation to allow a cross-

examination to take place; and, if they did allow it, we could not compel the Court of Chancery to receive and act upon the evidence obtained in a manner contrary to that which by its order had been directed and approved of.

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PER CURIAM.

Rule refused.

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THE declaration stated, that whereas the defendants, on the 8th day of December, A. D. 1845, were indebted to the plaintiff in the sum of 26*l.*, for the use and occupation of a certain messuage or tenement and premises, with the appurtenances of the plaintiff, by the defendants, and at their request, and by the sufferance and permission of the plaintiff for a long time then elapsed, had, held, used, occupied, possessed, and enjoyed. And in 26*l.* for money then found to be due from the defendants to the plaintiff on an account then stated between them. Which said several monies respectively were to be paid by the defendants to the plaintiff on request; whereby and by reason of the nonpayment thereof an action hath accrued to the plaintiff to demand and have of and from the defendants the said sum of money above demanded. Yet the defendants have not, nor hath either of them paid the said sum above demanded or any part thereof. To the plaintiff's damage of 5*l.*, and thereupon he brings suit, &c.

Plea. And as to the said causes of action in the declaration mentioned as to the said sum of 5*l.* parcel, &c., the defendants say that the plaintiff ought not to have or maintain his aforesaid action against them to recover any damages by reason of the nonpayment of the said sum of 5*l.* parcel, &c., because they say that they the said defendants, at the time when the said last mentioned sum became due

A declaration in debt contained two counts, each demanding the sum of 26*l.* Plea as to 5*l.* parcel, &c., a tender of 5*l.* before action brought. Replication, that at the time of the tender, the sum of 13*l.* 15*s.* was due from the defendants to the plaintiff as one entire sum, and on one entire contract not divisible from the sum of 5*l.*; that afterwards the plaintiff demanded the sum of 13*l.* 15*s.*, but the defendants refused to pay the same: *Held*, on demurrer, that the replication was good; as a tender of a part of an entire debt is bad in law; and if the

defendants relied on a set-off, &c., it should have been rejoined.

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and payable to the plaintiff, were and from thence hitherto, have been, and still are, ready to pay to the plaintiff the said sum of 5*L*, parcel, &c. ; and that after the time when the said sum of 5*L*, parcel, &c., became due, and before the commencement of this suit, to wit, on the 4th day of December, A. D. 1845, they, the defendants, were ready and willing, and then tendered and offered to pay to the plaintiff the said sum of 5*L* parcel, &c; to receive which of the defendants the plaintiff then wholly refused: and the defendants now bring the said sum of 5*L* into Court, here ready to be paid to the plaintiff, if he will accept the same; and this they are ready to verify; wherefore they pray judgment if the plaintiff ought to have or maintain his aforesaid action thereof against them to recover any damages by reason of the nonpayment of the said sum of 5*L* parcel, &c.

Replication. And the plaintiff as to the plea of the defendants by them above pleaded as to the said sum of 5*L* parcel, &c., saith, that he ought not to be barred from maintaining his aforesaid action against them, to recover damages and costs by reason of the detention and nonpayment of the said sum of 5*L*, because he saith, that before and at the time of the making of the said tender of, and of the refusal of the plaintiff to receive, the said 5*L*, as alleged in the said plea, and at the time of the request and of the refusal hereinafter alleged, and until and at the commencement of this suit, a larger sum than 5*L*, to wit, the sum of 13*L* 15*s*., being part of the money in the declaration mentioned and demanded, was due from the defendants to the plaintiff as one entire sum, and on one entire contract and liability, and inclusive of and not separate or divisible from the said sum of 5*L*, and the same being a contract and liability, by which the defendants were liable to pay to him the whole of the said larger sum in one entire sum upon request. And the plaintiff further saith, that after the said last mentioned and larger sum became so due as aforesaid, and at the making of the tender aforesaid, and before the commencement of this suit, and while the whole of the said

last mentioned and larger sum was so due as herein last aforesaid, and while the same remained wholly unpaid and unsatisfied, to wit, upon the 3rd day of December, A. D. 1845, the plaintiff requested of the defendants the said last mentioned and larger sum, of which the said 5*l*. in the said plea mentioned was then such indivisible parcel as herein-before said. Yet the defendants did not, nor would, at the time of the said request, or at any other time pay the plaintiff the aforesaid larger sum, to wit, the sum of 13*l*. 15*s*., wherefore the plaintiff refused the said 5*l*., as in the said plea above thereof alleged, as he lawfully might for the cause aforesaid. And this the plaintiff is ready to verify, &c. Wherefore the plaintiff prays judgment, and his damages and costs by reason of the detention and nonpayment of the said sum of 5*l*. to be adjudged to him, &c.

Demurrer, on the following grounds, that the said replication admits the tender of the said sum of 5*l*., as stated in the said plea thereto, but does not avoid the effect thereof by shewing any prior or subsequent demand of that particular sum, but alleges that the plaintiff on the day in the said replication mentioned, requested of the defendants a larger sum. That it is uncertain on the face and reading of the said replication, whether the plaintiff requested of the defendants payment of the said larger sum; and for all that appears to the contrary, the plaintiff might have requested of the defendants a loan of the said larger sum; but that even if the vague expressions used by the plaintiff in the said replication in that behalf can be construed to amount to an averment of a demand of payment of the said larger sum, still that a demand and refusal of payment of a larger sum than is stated in the plea to have been tendered, is no answer in law to such plea of tender. Further, that the said replication only alleges that the said larger sum was due from the defendants to the plaintiff at the time of the said alleged request, but this is not a sufficient reason for invalidating the tender, if there were any set off or just cause

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existing for not tendering or paying the larger sum: yet it is not stated in the said replication that there was not such set off or good cause for not tendering or paying the larger sum. The replication is also ambiguous and uncertain, as to the exact time at which the said alleged request was made, with reference to the time of making the tender, for it does not state distinctly whether the said alleged request was made before or after, or at the time of, making the tender. Also, that the said replication is bad in this, to wit, that the plaintiff hath in and by his declaration alleged and shewn that this action is brought for two distinct and separate debts, or sums of money, each of which is the subject of the respective counts of the declaration, and that the plea to which the said replication professes to be an answer, alleges a tender of 5*l*. parcel of those several debts or sums of money: yet the replication, while it in substance admits the making of the tender *modo et formâ*, &c., attempts to defeat its effect by alleging that the sum tendered was part of one entire sum, and due on one entire contract and liability, which is either an indirect and argumentative traverse of the tender *modo et formâ*, &c., or is a departure from the declaration in which two distinct contracts and causes of action are alleged. And also for that the said replication contains divers unmeaning repetitions with reference to the fact of the said alleged larger sum being due, and also divers unintelligible and ungrammatical expressions and superfluous phrases, and it irregularly prays judgment for costs, and is, in other respects, informal and insufficient.

Joinder in demurrer. The plaintiff's points for argument were, that the replication is good in substance, for that a plea of tender as to parcel is answered by shewing that the sum tendered was part of a larger sum due on one entire contract, and on one entire sum; and that the replication is also good in point of form; that the plea is, in substance, bad, because, being pleaded as to parcel of

monies mentioned in two indebitatus counts, each of which may comprise several distinct and entire contracts, the plea ought to have averred that the said sum of 5*l.* parcel, &c., was due upon some contract or contracts on which, at the time of the tender and refusal, no more was due than the said sum of 5*l.* parcel, &c.

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Unthank in support of the demurrer. The replication is bad, as it is quite consistent with it that the defendants had a set-off, or that a part of it was barred by the Statute of Limitations, and, if so, the plea would be good as an answer to the action. The plaintiff, therefore, ought, in his replication, to have alleged that no part of the claim was barred. The main point for the decision of the Court was, whether a tender of a part of an entire debt was valid. No decision directly in point had been pronounced by the Courts that such a plea was not good. So far as the authorities went, they must be considered in favour of such a plea. Where the claim was indivisible, as in the case of a bill of exchange, it might be that a tender of a part of the amount would not be good, but where the claim was divisible, there the plea of tender of a part of the claim was valid. Now, here the declaration claimed a debt due for use and occupation, and on an account stated. No doubt the two might become parts of one entire debt, but, as they appeared on the face of the declaration, the claim was divisible. One part might be barred by the Statute of Limitations, or the defendants might have a set-off to it. What objection, therefore, could there be to the defendants pleading a tender to the remainder of the claim due. [*Cresswell*, J.—But the plaintiff says in his replication, that the sum tendered was part of an indivisible claim. *Wilde*, C. J.—You are putting the case where the demand might be severed, and the plea is only consistent with a claim which may be severable or not severable; whereas, here, the plaintiff alleges the claim not to have been severable]. The

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declaration, however, shews that the demand was severable. He cited *Brandon v. Newington* (a); *Cotton v. Godwin* (b); *Tyler v. Blund* (c); *Sutton v. Foster* (d); *Jourdain v. Johnson* (e); *Armfield v. Burgin* (f); *Spybey v. Hide* (g); *Jones v. Owen* (h); *Rivers v. Griffiths* (i).

Talfourd, Serjt., contra. It was not necessary for the replication to allege that a portion of the claim was not barred by the Statute of Limitations, or that the defendants had not a set-off in answer to a portion of the plaintiff's claim. Those were matters peculiarly within the knowledge of the defendants, and if they existed they ought to be alleged by way of rejoinder. Then as to the question, whether the tender of a smaller sum was a valid answer to a demand of a larger. That a plea alleging such a tender was bad, was clearly shewn by the cases of *Tyler v. Bland* (c), and *Hesketh v. Fawcett* (k). In the former, a replication, alleging a demand of a larger sum than that tendered, in which the sum so tendered was embraced before the tender, was held to be good; and in the latter, a similar plea, omitting to allege the larger sum to be due by one entire contract, was insufficient. He also cited *Cotton v. Godwin* (b); and Year Books, 10 Hen. 6, fol. 23; 36 Hen. 6, fol. 13; 7 Hen. 7, fol. 5.

Unthank replied.

Cur. adv. vult.

✓(a) 3 Q. B. 915; S. C. 3 G. & D. 194.

✓(b) 7 M. & W. 147; S. C. 9 Dowl. 763.

✓(c) 9 M. & W. 338; S. C. 1 Dowl. 608, N. S.

(d) Year Books, 1 Edw. 5, fol. 5, and in error, 1 Ric. 3, fol. 1.

(e) 2 C., M. & R. 564; S. C. 4 Dowl. 534.

✓(f) 6 M. & W. 281; S. C. 8 Dowl. 247.

(g) 1 Campb. 181.

(h) 5 A. & E. 222; S. C. 6 N. & M. 620.

(i) 5 B. & A. 630; S. C. 1 D. & R. 215.

✓(k) 11 M. & W. 356; S. C. 2 Dowl. 827, N. S.

WILDE, C. J.—This was an action of debt for use and occupation, and on an account stated. The sum claimed in each count was 26*l*. Plea: As to the causes of action in the declaration mentioned as to 5*l*, parcel, &c., that the plaintiff ought not to maintain his action to recover any damages by reason of the nonpayment of 5*l*, because the defendants, when that sum became due, were ready and willing, and thence hitherto always had been, and still were, ready and willing to pay it, and before action brought, tendered, &c. Replication, that, before and at the time of making the tender, and at the time of the request and refusal after mentioned, and until and at the commencement of the action, a larger sum than 5*l*, to wit, 13*l* 15*s*, part of the money in the declaration mentioned and demanded, was due from the defendants to the plaintiff, as one entire sum, from one entire contract and liability, and exclusive of, and not separate or divisible from the said sum of 5*l*, and the same being a contract and liability by which the defendants were liable to pay to him the whole of the said larger sum, in one entire sum, on request; and, further, that, after the said last-mentioned and larger sum became due as aforesaid, and at the making of the tender aforesaid, and before the commencement of the suit, and while the whole of the said last-mentioned larger sum was so due as last aforesaid, and while the same remained wholly unpaid and unsatisfied, to wit, on, &c., the plaintiff requested of the defendants the said last-mentioned sum, of which the said 5*l* in the plea mentioned was then such indivisible parcel as aforesaid, yet the defendants refused to pay the said larger sum, wherefore the plaintiff refused the said sum of 5*l*. Verification.

Demurrer, because the tender is admitted, and not avoided, the demand of the larger sum not amounting to avoidance; and because the replication does not negative a set-off or other just cause for not paying the larger sum.

On the argument of this demurrer, on behalf of the plaintiff, in answer to the special ground of demurrer, that

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the replication should have negated the existence of any set-off, &c., it was contended, that any such matter might and ought to have come by way of rejoinder. And we think this is a sufficient answer.

The argument further involved the general question, whether a tender of part of an entire debt is good, and several ancient and modern authorities bearing on this question were cited, but no case directly in point; nor have we been able to find any. On consideration, however, we are of opinion, on principle, that such a tender is bad, and, consequently, that the replication is good.

In actions of debt and *assumpsit* the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*touts temps prist*) to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiâ* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiâ*), yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff, in which respect the plea of tender is essentially different from the payment of money into Court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

With respect to the averment of *touts temps prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can shew that an entire performance of the contract was demanded, and refused, at any time, when, by the terms of it, he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum

originally due is made, and refused, a subsequent tender of part of it is bad, notwithstanding that by part payment, or other means, the debt may have been reduced in the interim to the sum tendered. And this is the principle of the decision in *Cotton v. Godwin* (a). If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *touts temps prist*, even though the amount demanded were made up of the sum due under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions in *Brandon v. Newington* (b), and *Hesketh v. Fawcett* (c); which appear to overrule *Tyler v. Bland* (d).

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This principle, however, we think, is only applicable where the larger sum is demanded generally; and could hardly be enforced, where it is explained to the defendant at the time how the amount demanded is made up; for, in such case, the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *touts temps prist* as to each.

But, besides the averment of readiness to perform, the plea must aver an actual performance of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender on that very day. And this is the principle of the decisions of *Hume v. Peploe* (e), and *Poole v. Tumbridge* (f). It is also obvious that a defect in the plea in this respect cannot be remedied by perfecting the previous averment of *touts temps prist*. Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender *post diem*, is bad, notwithstanding the tender is of the amount of the bill, or note,

✓(a) 7 M. & W. 147.

✓(b) 3 Q. B. 915.

✓(c) 11 M. & W. 356.

✓(d) 9 M. & W. 338.

(e) 8 East, 168.

✓(f) 2 M. & W. 223.

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with interest from the day it became due up to the day of the tender, and notwithstanding that the plea alleges that the defendant was always ready to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*) (a), but also from the time when the bill or note became payable. On the same reasoning, it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of a part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow.

If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is, that the same argument might be applied to the instance of the tender post diem of the amount of a bill or note, with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender.

We are, consequently, of opinion that our judgment must be for the plaintiff.

Judgment for the Plaintiff.

/(a) 8 East, 168.

S. C. 4 Cb. 176.

KEFF v. WIGGETT and Another.

The Court will not, in an action against sureties on a bond, stay proceedings as to certain breaches, on

payment into Court of the amount admitted to be due on those breaches, so as to enable the defendant to try the question of liability on other breaches.

BYLES, Serjt., shewed cause against a rule obtained by Channell, Serjt., for rescinding an order made by Williams, J., under these circumstances. It was an action of debt on a bond given by sureties for a collector of taxes to secure

the faithful discharge of his duties. The bond was executed on the 6th of October, 1846, and on the 14th of the same month, the collector, a person named Lee, who was the principal debtor, died. No breaches were alleged in the declaration, but particulars of them had been given to the defendants, and consisted of various sums stated to have been received by Lee, but not paid over to the commissioners of taxes. Among these breaches were several small items which altogether amounted to a sum of 12*l.* 18*s.* 5*d.* As to these breaches the defendants had no answer. Among the items as to which it was alleged that Lee was a defaulter was one of 50*l.*, stated to have been received by Lee from Messrs. Coombes and Co., on the 3rd of November, 1845, which was previous to the execution of the bond. As to this item the defendants were advised that they had an answer, and were, therefore, desirous of litigating the question as to that without incurring the costs of resisting claims against which they had no defence. They, therefore, proposed to pay into Court a sum of money equal to the undisputed items, and to confine the inquiry to the item of 50*l.* An application was accordingly made at Chambers, and on the 20th of May, *Williams, J.*, made the following order: "Upon hearing both parties, &c., I do order, that upon payment into Court of 12*l.* 18*s.*, the amount of the second and subsequent items of the plaintiff's demand, all further proceedings as to those items be stayed, the plaintiff being at liberty to sign judgment as a security for any further breaches of the condition of the bond, but such judgment shall not be signed until after the trial of one or more issue or issues raised or to be raised upon the defendants' liability on the said breach, or until the further order of the Judge or Court thereon." Unless this order was sustained great injustice would be wrought to the defendants. The only matter in dispute was the item of 50*l.*, but if the defendants could not succeed in their object, the plaintiff could try the question entirely at the expense of the defendants. The situation of the

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defendants would be in no way improved by suffering judgment by default, as then the plaintiff would suggest breaches, and the defendants be placed in the same difficulty. [Maule, J.—At common law, previous to passing the statute of the 8 & 9 Wm. 3, c. 11, in such a case as the present, the defendants could only be relieved in equity. That statute compelled the plaintiff to assign breaches. The plaintiff was, however, still able, if he assigned several breaches, and one only had been committed, to try the question as to the other breaches at the expense of the party who had broken his bond. It by no means follows that because the Legislature has proceeded a certain way in relieving parties, that, therefore, the Courts should go still further]. The Court, no doubt, refused a similar application to the present in the case of *Gowlett v. Hanforth* (a), but there the Court proceeded on the special framing of the condition; it would, therefore, seem that but for the peculiar language of the condition, the Court would have interfered in the manner required. Here, the condition was in the ordinary form. In analogous cases the Court had interfered in a similar manner. Thus, in *Brunsdon v. Austin* (b), in an action of trover, the Court of King's Bench made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up. So in *Earle v. Holderness* (c), in an action for trover for a packet of letters, the defendant was allowed to stay proceedings as to one of them, upon delivering it up, and paying costs. If the learned Judge's order were rescinded, great injustice would be caused to the defendants.

✓(a) 2 W. Bl. 958.

✓(c) 4 Bing. 462; S. C. 1 M.

(b) 1 *Tidd's Pract.* p. 545, & P. 254.
 9th ed.

Channell, Serjt., *contra*. If the relief sought to be obtained by the defendants in the present case could have been granted antecedent to the 8 & 9 Wm. 3, c. 11, that statute was unnecessary. But no doubt existed that such relief could not be given in a Court of Law, and, therefore, parties were compelled, in order to protect themselves from payment of the penalty, to have recourse to a Court of Equity. That statute, however, did not enable the obligor to obtain such relief, nor had the statute of the 4 Anne, c. 16, that effect. Neither of those statutes prevented the penalty from being the debt due at law. The case of *Van Sandau v. —*, one, &c. (a), was a direct authority against the present application. There, an action was brought to recover the penalty in a bond conditioned for the payment of a principal sum in the year 1820, with interest in the mean time half-yearly. A failure in the payment of half a year's interest on the 29th of September, 1817, was the breach of the condition, and that merely in consequence of a slip; but the Court refused to stay proceedings on payment of the interest due and costs. The case of *Steel v. Bradfield* (b), was an analogous case; the payee indorsed on a promissory note that if the interest was paid on stipulated days during her life, the note should be given up. The defendant on one occasion omitted to pay the interest, and an action was commenced upon the note. The Court refused to stay proceedings on payment of the interest and costs. The cases cited on the other side were actions of tort, and were, therefore, inapplicable to the present motion.

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WILDE, C. J.—It seems to me that the Court has no right to interfere as desired. Before the statute of William it is well known that the penalty had become the debt by a breach of the condition, and the obligor was, therefore, driven to equity to obtain relief. Relief has been given by the Legislature to a certain extent, and we have no

✓ (a) 1 B. & A. 214.

✓ (b) 4 Taunt. 227.

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power to extend that remedy. The plaintiff in the present case is in possession of certain legal rights, and we are not entitled merely at our discretion to deprive him of his legal rights. There is no doubt that in trover and some other cases, the Court have interfered in the manner described. I should have felt a difficulty in adopting such a departure from what appears to be a rule of law, but I should be bound to yield to their authority. In this case, however, I am asked to give a more extended relief than the statute of William has given. But if we gave the relief prayed for, we should be making and not administering law; the present rule must, therefore, be made absolute.

COLTMAN, J.—During the lapse of time which has taken place since this statute was passed, the inconvenience stated in the present case must frequently have occurred, yet no precedent has been shewn that such an interference as is here required has taken place during that period. This it appears to me is a strong reason against our interference.

MAULE, J.—Before the passing of the statute of William we had no power at law to grant relief against the penalty of the bond, where a breach of the condition had taken place. That is conceded. Then having no jurisdiction to give relief in such cases as the present, the statute of Wm. 3 was passed; then has that statute provided for such a species of relief? The statute says, that relief shall be given in certain cases, but not in the manner proposed by the defendants. The presumption is, that the Legislature meant to give relief in no other cases. This is not one of those mentioned in the statute; and, therefore, by giving the relief prayed, we should, in fact, be doing that which the Legislature, and not the Court, would be authorized to do. I think the rule should be made absolute.

CRESSWELL, J., concurred.

Rule absolute.

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HARRISON v. COTGREAVE.

ASSUMPSIT. The declaration in the first count stated, that on the 16th of February, 1846, the plaintiff made his bill of exchange in writing dated, to wit, the day and year aforesaid, and directed the same to the defendant, &c. And the defendant afterwards, and before the commencement of this suit, to wit, on the day and year aforesaid, accepted the said bill, &c.

The defendant pleaded fourthly, that the defendant accepted the said bill of exchange in the said first count mentioned, whilst he, the defendant, was an infant within the age of twenty-one years, to wit, of the age of eighteen years, the said bill of exchange being, at the time of such acceptance thereof, without any date written thereon, and that the plaintiff afterwards, to wit, on the day and year in the said first count mentioned, altered the said bill of exchange, by dating the same and writing a certain date thereon, to wit, the day and year last aforesaid, whereby the said bill of exchange was made to bear date of a day long after the making and such acceptance of the said bill, and after the time at which the defendant attained his age of twenty-one years, to wit, on the day and year last aforesaid; and that there never was any license or authority, ratification, or assent of the defendant, for or to such alteration as aforesaid, given by the defendant at any time after he had attained his age of twenty-one years. And the defendant further says, that there never was any other acceptance by him of the said bill, except as aforesaid. Verification.

Special demurrer, on the grounds, among others, that the plea is multifarious in alleging the plaintiff's infancy at the time of accepting the bill, that he accepted the bill without a date (which, as the bill is alleged in the declaration to have been dated, amounts to a denial of the acceptance and making), and that the bill was altered by the plaintiff without license or ratification by the defendant. That the plea

To a declaration on a bill of exchange against the defendant as acceptor, he pleaded that he accepted the bill while he was an infant, it being without date at the time of the acceptance; that the plaintiff afterwards altered the bill by writing a date thereon; and that there never was any license or ratification by the defendant to such alteration, after he attained the age of twenty-one years: *Held*, on special demurrer, that the plea was not bad for duplicity.

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is double, in setting up infancy, and alteration by the plaintiff without the defendant's assent. That the plea is an argumentative denial of the making and acceptance, and ought to have concluded to the country.

Crompton, in support of the demurrer. The plea presents several defences, and, therefore, throws an undue difficulty on the plaintiff in replying. The first ground of defence set up is that of infancy, which is of itself a sufficient answer to the action. Secondly, it alleges that the bill on which the plaintiff has declared, is different from the one accepted by the defendant, for it states the date of it to be different. Under the plea of non accepit that fact would afford a defence. Thirdly, it alleges an alteration in the bill without the assent of the plaintiff. That fact would also afford a good defence. It was impossible, therefore, for the plaintiff to reply to a plea of such a multifarious description. Again, the plea, so far as it alleged the unauthorized alteration of the date, was argumentative, as by inference it denied the acceptance as alleged in the declaration. If the defendant was able to prove the facts so alleged he would succeed in his defence; as in *Davidson v. Cooper and Another (a)*, where an action of assumpsit was brought on a guarantee, the defendant pleaded, that after the guarantee had been made and signed, it had been altered in a material particular by some person to the defendant unknown, and its nature and effect materially changed, by such unknown person affixing a seal by or near to the signature of the defendant, so as to make it purport to be sealed by the defendant, and so to be his deed. There, the Court of Exchequer held, upon a motion for judgment non obstante veredicto, that the plea afforded a good defence to the action.

Channell, Serjt. (with him *Townshend*), was stopped by the Court.

✓(a) *Ante*, vol. 1, p. 377; S. C. 11 M. & W. 779. ✓

WILDE, C. J.—I am of opinion that this plea is sufficient. The declaration alleges, that the defendant made his bill of exchange, “to wit, on, &c.,” this is not an allegation of a particular day, and the authorities shew that a bill is a perfect instrument without any date, and runs from the time of its delivery. The plea, therefore, in effect says, “I accepted the bill mentioned in the declaration, and I will tell you how and when I accepted it; it had no date, the plaintiff afterwards put in the date; and the date of the making and of the acceptance was before I was of age, therefore I am not liable.” These are not several defences set up; but several allegations are made, which, together, constitute the single defence of infancy. The effect, therefore, of the plea is with reference to the alteration, that it was introduced, not without any authority in point of fact, but without such an authority as renders the defendant liable. The plea, therefore, does not disclose two defences, and is consequently good.

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COLTMAN, J.—I am of the same opinion. At first I doubted whether there were not two distinct defences alleged in this plea. I am, however, satisfied that that is not the case. A plea is not objectionable, because it contains two defences of such a description that the latter is incomplete without the assistance of the former. Thus, in the present instance, the former defence is infancy; the latter, an alteration of the bill; there is not, however, any allegation that the defendant did not assent to that alteration. That defence, therefore, is incomplete for want of such an allegation; an alteration is not a good defence unless the plea goes on to allege, that it was made without the defendant's assent. The defendant does that by saying he gave no consent after he became of age; and then, whether he gave a previous consent or not, is immaterial, and thus all the facts alleged in the plea are shewn to have taken place during the infancy of the defendant.

MAULE, J.—It appears to me that this is a good plea of

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infancy. The plea is, that the defendant accepted the bill in a particular manner, that the plaintiff, afterwards, while the defendant was an infant, altered the bill by inserting a date; such alteration not being authorized by the defendant after he became of age. "The whole acceptance was complete before I came of age, and I did not ratify it afterwards." The plea of infancy is complete at the end of the first paragraph; the addition of the special circumstances do not alter it, nor do they add another defence; it stands as it did before they were introduced, "I accepted when I was an infant."

CRESSWELL, J., concurred.

Judgment for the Defendant.

S.C. 4 Cto. 705.

FIELD v. M'KENZIE, Public Officer.

Execution was issued against several existing members of a banking co-partnership, established under the 7 Geo. 4, c. 46, and no satisfaction had been obtained, and grounds were shewn for believing that none of the existing members were solvent; the Court permitted a scire facias to issue against persons who were members at the time of the

contract being made, although execution had not been issued against all the existing members; *Wilde, C. J., dubitante.*

The Court will not shorten the time for shewing cause against a rule for issuing a scire facias on the ground that the three years limited by the statute for proceeding against retired members might expire before execution could issue.

M*A***R***T**I****N** moved for a rule to shew cause why a writ of scire facias should not issue on the judgment obtained against the defendant, who was the registered Public Officer of the Newcastle-upon-Tyne Joint Stock Banking Company, for the purpose of obtaining satisfaction from certain persons who were retired members of the company, but who had been members of it at the time when the contract was made. The judgment was founded on a promissory note for 14,000*l.*, dated the 26th of February, 1845. The persons against whom the application was made, had retired less than three years from the partnership. The affidavit on which the application was founded was that of the plaintiff's attorney, who stated the fact of obtaining judgment against the public officer on the 12th of April, 1847. He then proceeded to state that a writ of fieri facias*

see post 219. 511
" - 368
6 Dec - 440

was issued into the county wherein it was believed the defendant resided, and that the sheriff returned nulla bona. A scire facias was then issued against seven of the existing members, and writs of fieri facias directed to the sheriff of the respective counties in which the parties resided. To some, returns of nulla bona were made, and to others, no return at all. It was, however, believed that no part of the judgment would be obtained from any of them. The last return made pursuant to the act of Parliament contained the names of fifty-four persons as members of the co-partnership. On inquiring as to these persons it was discovered that eight of them were dead, all of whom had died in distressed circumstances; nine were out of the jurisdiction of the Court; seven were domestic or other servants; one was matron to a lunatic asylum; eight had become bankrupt or assigned away their property; two had ceased to be members since the return was made; twelve were in the rank of pitmen, excisemen, clerks, and others of very limited means. A similar account was given as to all the rest, except two; and the affidavit concluded by stating, "that all the present members of the co-partnership are unable, as deponent verily believes, to pay the said debt and costs in this cause, and that he verily and firmly believes that the creditors of the said banking company will all lose their respective debts unless they are allowed to proceed in the present manner against the retired members." As to one of the defendants named Stocks, it appeared by the returns under the statute 7 Geo. 4, c. 46, that although his name appeared in the return of March, 1844, it was not mentioned in the return of March, 1845, and those subsequently made. His name was also omitted in a return of November, 1844, but which was not pursuant to the act; it was not, however, stated in the return of 1845 as that of a person who had ceased to be a member. Supposing the Court to be inclined to grant the rule nisi, it was important that the time for shewing cause against it should be limited beyond that prescribed by the practice of the Court, as otherwise the three years prescribed by the statute for proceeding against persons who had ceased to be members of the company would elapse.

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WILDE, C. J.—I do not see any ground for imposing the restriction as to the time for shewing cause, but a rule nisi in the usual way may be granted.

Rule nisi granted.

Watson, Channell, Serjt., Cowling, Sir John Bayley, and Bramwell, shewed cause. The plaintiff was bound, before he proceeded by scire facias against the partners, now sought to be charged, to shew that all means for obtaining payment from the existing members of the co-partnership had been exhausted. The case of *Eardley v. Law* (a) was an authority to that effect. It was essential for that purpose to shew that execution had been issued against all the present members of the company, in order to ascertain that nothing could be obtained from them. Besides, sufficient proof had not been given that the parties, more especially Stocks, against whom it was sought to issue the scire facias, were members of the co-partnership at the time when the contract was made; *Steward v. Dunn* (b).

Martin and *H. Hill* supported the rule. The effect of the decision in *Eardley v. Law* was, that bonâ fide efforts should be made by the plaintiff to procure liquidation of the demand from the existing members of the co-partnership. The affidavits shewed that such efforts had been made. If it was necessary to issue execution against the existing members of the co-partnership in pursuance of section 13 of the statute, that had been done. By that section, it was provided, that upon a judgment against a public officer execution may be issued against any member or members for the time being; and that in case any such execution against any member or members for the time being of any such co-partnership shall be ineffectual, it shall be lawful to issue execution against any person or persons who was or were a member or members of such co-partnership at the time the contract was entered into. The meaning of that section was, that if execution had issued against one only of the

(a) 12 A. & E. 802; S. C. 4 P. & D. 379.
 (b) 12 M. & W. 655; S. C. *ante*, vol. 1, p. 642.

existing members of the co-partnership, the plaintiff was in a situation to proceed against those persons who were members of it when the contract was made. Such an execution had issued in the present case.

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WILDE, C. J.—In this case, the majority of the Court are of opinion that the rule should be absolute for issuing the *scire facias*. For myself, I have considerable doubts; but I entertain the greatest respect for the opinions of my Brothers, and it is important that the plaintiff should not be delayed. The first point is, whether it is sufficiently shewn that the parties were members at the time of the contract. That depends upon three facts. The attorney swears he is informed, and believes that these parties were such members, and he then goes on to give the grounds for his belief. It was the duty also of the bank to make a return of those who had retired from the concern. There is found a return, upon oath by the cashier, of the persons who, by the books of the company, appear to be members. The attorney sets that forth, and says he is informed and believes that the different parties are members. There is no return of any of them having ceased to be members; but there is a return, not at the time required by the act, in November, purporting to contain a list of the members, and omitting one of the present parties. That return, however, is not pursuant to the act. There is no affidavit that the parties have ceased to be members. The question therefore is, whether there is sufficient *prima facie* evidence to warrant the Court issuing the writ, that is, whether enough has been done to entitle the plaintiff to put the question between him and the other parties in issue. Considering that the object of the writ is to enable the parties to try their respective rights, and that they will not be finally bound by the decision of this Court, the Court thinks that enough has been done to entitle the plaintiff to his rule in this respect. The second question is, whether the plaintiff has brought sufficient materials before the Court to shew that he has satisfied in form and substance the statute 7 Geo. 4, c. 46, so as to induce the Court to believe that he has used due diligence

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in endeavouring to obtain satisfaction. It appears that he has issued several writs of fieri facias, each of which has been ineffectual; to most of them there has been a return of nulla bona, and with respect to all, there is the oath of the attorney, that he believes that no part of the debt or costs would be obtained from any of them. The first point is, whether the issuing writs of execution against any number, short of the whole existing members (and there is no difference between the issuing against one, and against several, but short of the whole), is sufficient to give the plaintiff a locus standi against the non-existing members. I have myself considerable doubts upon this subject; my Brothers, however, are all of opinion that it is sufficient, and on the present day (*a*) it is not necessary to have this question more discussed, our judgment on this point not concluding the parties. The Court, therefore, are of opinion that this does give the plaintiff a locus standi. Then, has the plaintiff in his affidavits shewn that due means have been taken to obtain execution? As to all but two, he states the situation in life of the existing members; whether those two have been omitted from mistake or otherwise, the Court are unable to see; but there is no affidavit in answer pointing out any existing member as a man of substance; it is left wholly upon the affidavits of the plaintiff. This is the important part of the case, because, on the question whether due means have been taken to obtain execution, the opinion of this Court may be conclusive. For my own part, I have some doubts, but my Brothers are of opinion that enough has been done. With respect to Stocks, it does not appear that his situation is so far different as to prevent the plaintiff from trying whether he was really a member. He was at one time returned as a member, and though he was subsequently omitted, yet he was not returned as a party who had ceased to be a member.

PER CURIAM.

Rule absolute.

(*a*) The last day of Term.

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WELLS v. LORD SUFFIELD.

S.C. 4 C.B. 750.

HURLSTONE moved for a rule nisi to set aside a pluries writ of summons on two grounds: first, that it improperly described the defendant as "the Right Honorable Baron Suffield," his proper description being "the Right Honorable Edward Vernon Harbord, Baron Suffield;" and, secondly, that the præcipe on which the pluries writ issued was a præcipe for an alias writ. The pluries writ was dated the 27th of May, and it appeared, on searching at the office, that a præcipe for an alias writ had been obtained on the same day. On the first point, the case of *Tomlin v. Preston and Another* (a) was an authority to shew that in such a case the Court would interfere by setting aside the process. [*Maule, J.*—How does it appear that the word "Baron" is not a Christian name? We cannot take judicial notice that it is not. If so, then the objection is only on the ground of misnomer, and may be cured on application by summons.] The second objection was, that in fact there was no præcipe to justify the issuing of the writ. It was, therefore, irregular; *Wadworth v. Allen* (b).

A writ described a defendant as "the Right Honorable Baron Suffield," his true description being "the Right Honorable Edward Vernon Harbord, Baron Suffield;" the Court refused to set aside the process on that ground.

A præcipe being obtained for an alias writ, a pluries was by mistake issued: *Held* to be no ground for setting aside the pluries.

WILDE, C. J.—By examining the dates, it is evident that by a mistake the writ has been called a pluries instead of an alias as in the præcipe. That error cannot be of the least importance in any part of the subsequent proceedings in the cause.

PER CURIAM.

Rule refused.

(a) 1 Chit. Rep. 397.

(b) *Ibid.* 186.

COURT OF EXCHEQUER.

Michaelmas Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

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Trespass.
The first count of the declaration was for trespasses committed in three closes, A. B. and C. The second count, for trespass in a fourth close. The defendant pleaded not guilty to the whole. He also pleaded to the first count a public way over A. B. and C., and other pleas. The plaintiff traversed all

ACTION of trespass. The first count was for breaking and entering certain closes of the plaintiff, called respectively "Six Acres," "Five Acres," and "Northovers."

The second count was for breaking and entering a certain other close of the plaintiff, described by its abutments.

The defendant pleaded, first, not guilty: secondly, as to the first count, that the said closes therein mentioned were not the closes of the plaintiff: thirdly, as to the first count, a public footway over the closes therein mentioned, in the user of which the trespasses were committed: fourthly and fifthly, as to the first count, pleas of a right of footway in the defendant by user for twenty and forty years respectively.

the other pleas, and also the plea of public way, so far as it related to A. and B., and new assigned trespasses extra viam as to C. The jury found for the defendant on not guilty as to the second count, and also on the plea of public way as to closes A. and B. The plaintiff had a verdict on all the other issues, and on the new assignment, on which the jury assessed his damages at one farthing. The Judge did not certify under the 3 & 4 Vict. c. 24: *Held*, that the plaintiff was entitled to have taxed for him the costs of the issues found in his favour as to closes A. and B.; but that under the 3 & 4 Vict. c. 24, he was not entitled to any costs upon any of the issues as to close C., with regard to which he had succeeded, but had recovered less than 40s. damages.

The plaintiff replied, by adding the similiter to the first and second pleas. As to so much of the third plea as related to the closes called "Six Acres" and "Five Acres" respectively, he traversed the public footway; and so far as the plea related to the close called "Northovers," he new assigned trespasses committed extra viam. As to the fourth and fifth pleas respectively, he traversed the user therein alleged.

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The defendant pleaded not guilty to the plaintiff's new assignment as to "Northovers," and joined issue on the replications to the rest of the pleas.

At the trial at the Summer Assizes for Somersetshire, 1847, a verdict was found for the plaintiff on so much of the first plea as related to the first count, and for the defendant on so much thereof as related to the second count. The plaintiff had a verdict on the second plea. On the issue raised on the replication to the third plea as to "Six Acres" and "Five Acres," the verdict was for the defendant. On the new assignment as to "Northovers," the plaintiff had a verdict, with a farthing damages. The other issues were found for the plaintiff. The Judge did not certify under Lord *Denman's* Act.

The Master refused, upon taxation, to allow the plaintiff any costs; and a rule was subsequently obtained by *M. Smith* on behalf of the plaintiff, calling on the defendant to shew cause why the Master should not review his taxation.

Taprell shewed cause. The plaintiff is not entitled to costs. He is deprived of them by Lord *Denman's* Act, 3 & 4 Vict. c. 24. Under the 43 Eliz. c. 6, the plaintiff was not entitled to costs of issues found for him upon pleas pleaded by leave of the Court, where there was a certificate under that statute; although the Judge had not certified that there was probable cause for the defendant so pleading; *Howard v. Cheshire (a)*. The object of Lord

(a) 1 Say. 260.

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Denman's Act is the same as that of 43 Eliz. [*Alderson*, B. —The words used in the statute of Elizabeth are peculiar. It enacts, that where the debt or damages to be recovered shall not amount to 40*s.*, the Judge "shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount to." Lord *Denman's* Act was intended to prevent unnecessary actions, but your argument would make it a premium to unnecessary pleadings. *Parke*, B.—All the act does is to take away all costs which the plaintiff would get in consequence of the verdict for him. It does not deprive him of the costs of the defendant's unnecessary pleas to those parts of the causes of action as to which the defendant substantially succeeds.] Under Lord *Denman's* Act, where a plaintiff recovers a verdict at all, and his damages do not amount to 40*s.*, he can have no costs, unless the Judge certifies. It makes no difference that the declaration complains of other grievances besides those in respect of which the damages are given. He is to have no costs in respect either of those causes of action on which he has succeeded and recovered trifling damages, or of the defendant's unnecessary and untrue pleadings to those of the causes of action as to which the defendant has succeeded. The case of several causes of action contained in one declaration, and coming to different results, does not seem to have been contemplated by the act at all, or intended to make any difference; *Marriott v. Stanley* (a), per *Maule*, J. Statutes passed to check frivolous actions by depriving plaintiffs of costs, have always been construed liberally; *Irvine v. Reddish* (b); *Simpson v. Hurdiss* (c); *Fry v. Monckton* (d). The statute 4 Anne, c. 16, s. 5, is not applicable to this case, because there is not here any plea found for the defendant which would entitle him to

✓(a) 9 Dowl. 61; S. C. 1 M. & ✓(c) 2 M. & W. 84; S. C. 5 Dowl. G. 853; 2 Scott, N. R. 60. 304.

(b) 5 B. & A. 796; S. C. 1 D. (d) 9 Dowl. 967.
 & R. 413.

the general costs of the cause; *Richmond v. Johnson* (a). In *Newton v. Rowe* (b), which was an action of libel, the plaintiff had a verdict, with one farthing damages, on the general issue, and on several issues arising on special pleas. There was no certificate, and the plaintiff was held to be entitled to no costs whatever. [*Pollock*, C. B.—In that case the plaintiff had succeeded on all the issues.]

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Montague Smith, in support of the rule. These costs ought to be taxed for the plaintiff, and that without infringing on any decided cases. There are three distinct trespasses to three distinct closes here complained of. The pleadings as to each are entirely separate. The new assignment on which the plaintiff has succeeded applies only to one of them. As to the other two, the defendant has obtained his verdict on pleas going to the whole cause of action. It is as to these two latter upon which the defendant has thus obtained a general verdict, that the plaintiff seeks the costs of the pleas which defendant has improperly pleaded. As to the cause of action upon which the plaintiff has succeeded, it is admitted that he is entitled to no costs. *Newton v. Rowe* (b) is no authority, because there, there was only one cause of action, and the plaintiff had succeeded upon all the issues. This question can only arise in a case like the present, where there are several causes of action. If three separate actions had been brought for these several trespasses, it is clear that the plaintiff would have been entitled to no costs in the case where he has succeeded, but in the other two he would have been entitled to deduct from the defendant's costs those which had been incurred by him in respect of the defendant's unnecessary pleas. Is he put into a worse position by having united all his grievances in one action?

Cur. adv. vult.

(a) 7 East, 583.

(b) 1 C. B. 187; S. C. *ante*, vol. 2, p. 815.

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POLLOCK, C. B., afterwards delivered the judgment of the Court.—In this case the plaintiff brought an action for several trespasses in three different closes; Six Acres, Five Acres, and Northovers, in one count. In the second count, another close. Not guilty was pleaded to all: secondly, not the plaintiff's closes: thirdly, a public way over the three closes in the first count: fourthly and fifthly, a private way over the three closes, by prescription, twenty years' user and forty years' user. These four latter pleas were to the first count alone. The replication took issue on the first and second pleas, and traversed all the others, except that of the public way, so far as related to Northovers, as to which the plaintiff newly assigned trespasses *extra viam*, which was denied by the rejoinder.

On not guilty, the verdict was for the plaintiff on the first count: for the defendant on the second. On the second plea for the plaintiff. On the third, as to Six Acres and Five Acres, for the defendant. On the new assignment, for the plaintiff, with one farthing damages. And the issues on the fourth and fifth pleas were found for the plaintiff.

The Master refused to tax the plaintiff any costs, and a rule nisi was obtained to review the taxation.

Upon this record it appears that the plaintiff has altogether failed, and the defendant has succeeded with respect to the causes of action in two closes; but that he has pleaded as to those causes of action four several unnecessary pleas, on which the plaintiff had a verdict. With respect to the cause of action for trespasses in the third close, the plaintiff has brought an action, in respect of which he has obtained only one farthing damages, and so far, therefore, as relates to that cause of action, the effect of Lord *Denman's* Act is to deprive the plaintiff of all costs. This result is a punishment for having brought a frivolous action for that cause; and there is no doubt, that if the plaintiff had sued for that cause of action alone, and there had been special pleadings all found for him, he would

have lost all the costs of all the issues, as was properly decided in the case of *Newton v. Rowe* (a). In such a case the statute 4 Anne, c. 16, does not apply, for no one plea to the cause of action is found for the defendant. In such case it may be that there is an inconvenience (as suggested in this case) as contrasted with the case of a verdict for the defendant upon the plea of not guilty, and for the plaintiff on the justifications. But in the case where the defendant so succeeds, the matter in dispute may have really been of serious amount to the plaintiff; whereas when the plaintiff succeeds, it is, by the verdict of the jury, ascertained to be so frivolous, that the Legislature has thought no action at all should have been brought in respect of it. "Other hardships," as my Brother *Maule*, in *Newton v. Rowe*, properly observed, "might possibly be suggested. But no doubt the Legislature has thought that all these are outweighed by the advantages to result from the discouragement of petty litigation."

We concur entirely in that decision, and if there had here been a set of special pleas to the new assignment, all found for the plaintiff, the plaintiff could still have had no costs whatever in respect thereof.

But here there is a divisible cause of action in respect of the trespasses in two of the three closes in the first count. We have held such a cause of action to be divisible in ejectment, *Doe d. Bowman v. Lewis* (b); as it had been previously held to be divisible in other cases, as in *Cox v. Thomason* (c), and other authorities on this point. The plaintiff, therefore, with respect to these causes of action, is not in the position of a person bringing a frivolous action, but in that of a person who has brought an action it may be, for a real grievance, but in which he has failed. If this action had been brought for that cause alone, it is clear that, under the statute of 4 Anne, c. 16, the plaintiff would

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✓(a) 1 C. B. 187.

(c) 2 C. & J. 498.

✓(b) 13 M. & W. 241.

brought the present action on the covenant in the mortgage deed, for the recovery of principal and interest. A Judge's order was afterwards drawn up for a stay of proceedings, on payment by defendant of principal, interest, and costs, which were paid on the 6th of February, 1847. The defendant having been unable to obtain from the plaintiffs the mortgage and other deeds relating to the property, which were detained under pretext of a lien upon them claimed by the plaintiffs' attorney, a summons was taken out in the action, calling on the plaintiffs to shew cause why they or their attorney should not deliver up the deeds, and why they or their attorney should not pay the costs of the application. On the 25th of February, an order was made by *Platt*, B., that the plaintiffs should deliver up the deeds and pay the costs. A rule nisi to rescind this order having been obtained by *Martin*,

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Whitehurst and *Flood* shewed cause. The Judge was right in making this order. It is enacted by the first section of the 7. Geo. 2, c. 20, that "where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's Courts of Record at Westminster," &c., if the person or persons having right to redeem, &c., shall pay, &c., the Court shall and may, by rule or rules of the same Court, compel such mortgagee or mortgagees to reconvey, &c., "and deliver up all deeds, evidences, and writings," &c., "unto such mortgagor," &c. The plaintiffs will probably argue that this statute is not applicable, and that it gives no power in this case, either to a Judge or to the Court, because the word "bond" alone is used in it. It is submitted that the effect of the statute is not so confined, and that the case of an action of covenant, such as the present, comes within it. There is an *Anonymous case* (a)

(a) 2 Chit. Rep. 264.

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reported in the books which is in point. *Dixon v. Wigram* (a) is exactly to the same effect. In both these cases the Court held distinctly that actions of covenant were within the statute. But supposing for a moment that they were not, it is submitted that this is a case of a "bond" within the meaning of the statute. The word "oblige" is not necessary to make a bond. Any acknowledgment of debt, or promise to pay under seal, is a bond; *Sawyer v. Maxwrigde* (b); *Petersdorff's Abr.* tit. "Bond." It will be contended on the other side, that whatever authority the Court might have had under the statute to make this order, it could not be made by a Judge at Chambers. The statute is said to refer to the Court throughout. It enacts that, "by rule or rules of the same Court," the mortgagee may be compelled to deliver up the deeds; and all the other acts referred to in that clause of the statute are apparently to be done by the Court. Doubtless, therefore, it is to the Court originally that jurisdiction is given by this act of Parliament, but the question is, whether that jurisdiction may not well be delegated by the Court to a Judge at Chambers. Any order made at Chambers is subject to alteration or rescission by the Court, so that no hardship can accrue from a Judge having the power, though the greatest inconvenience might follow upon his wanting it. Wherever it is not clear from the language of a statute that the jurisdiction of a Judge was meant to be excluded, he may do all that can be done by the Court, and his acts, when adopted by them, are binding upon them. Judges at Chambers are in the constant habit of exercising powers which belong to the Court by the common law.

Martin and Mellor, in support of the rule. This order is bad, and made without jurisdiction. *Dixon v. Wigram* ought to be overruled. The *Anonymous case in Chitty* (c) seems to shew, that *Bayley, J.*, considered that the Court had no

(a) 2 C. & J. 613.

(c) 2 Chit. Rep. 264.

(b) 11 Mod. 218.

authority. In the case of *Becke v. Smith* (a), *Parke, B.*, states the rule in the construction of a statute to be, "to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." In this case the strictest adherence to the words of the statute is neither absurd nor repugnant. The preamble of this statute shews that it was intended only to apply to actions of ejectment, and actions on bonds given by mortgagors to pay the money secured by such mortgages,—“Whereas mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money secured by such mortgages, and for performing the covenants therein contained,” &c. The word “mortgages” there means “mortgage deeds,” and this shews that the bond referred to must be a collateral one, and not the deed itself. [*Parke, B.*—“Mortgage” means the pledge of the estate.] It must mean the deed in this statute, because it speaks of the “covenants therein contained.” [*Rolfe, B.*—I cannot help thinking that the words “on any bond,” were introduced into this statute *ex abundanti cautela* in order to include even collateral securities. It has always been the practice to consider such actions as the present within the statute. *Alderson, B.*—You are seeking to destroy the usefulness of the statute by adhering to the very literal construction of it.] Then this is not a power which can be exercised by a single Judge. It is expressly given by the statute to the Court. [*Alderson, B.*—Judges are constantly in the habit of setting aside judgments for irregularity, and exercising other powers which belong expressly to the Court by the common law. It makes no difference that the power comes to them by statute, except that in some cases the statutes

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(a) 2 M. & W. 191, 5.

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themselves which give the authority, make the difference in express terms between the powers of the Court and those of the Judge.] He referred also to *Shaw v. Roberts* (a).

POLLOCK, C. B.—This rule must be discharged. The points appear to lie in a very narrow compass. Mr. *Martin* contends, that as this is an action of covenant, and not an action on a bond or of ejectment, no power of interference is given by the statute; and he also argued, that even if there is such authority it is given to the Court, and not to a single Judge at Chambers, who at all events has no power to make the order. I think neither of these objections ought to prevail. The first point is already decided by express authority in a case which occurred many years ago, and has no doubt been often acted upon since. I think, however, that if we were called upon to construe the statute for the first time, we might have interpreted it so as to make it apply to the present case without any strained construction. It appears to me, therefore, that though this is an action of covenant, it may be considered as falling within the meaning of the word "bond." But when a statute has once received in this Court an express exposition, we ought not again to entertain the matter, and I prefer, therefore, to rely on the authority of the case already decided. As to the second objection, I think one answer to it at this stage is, that the Judge's order is now a rule of Court; but I am also of opinion that the Judge had the power to make the order. It has already been pointed out, in the course of the argument, that where a power is given by act of Parliament to this Court, it is to be used in the way in which the ordinary powers of this Court are usually exercised; and there is no distinction between the powers of the Court at common law and those under a statute, unless there is something peculiar in the statute. It has also been pointed out how that distinction may arise. Some statutes give powers to the Court *eo nomine*, and in other parts of them

(a) 2 Dowl. 25.

give authority to a Judge at Chambers, and in this case the authority of the Judge being clearly in the view of the Legislature at the time, it may well be that they meant to give power to the Court alone where they mentioned the Court only. In other cases the application is specially directed to be made to the Court in Term time. In such cases the Court itself has no power out of Term, and it has been properly held, that even in Term the power is confined to the Court. The very use, however, of these particular forms of expression in particular statutes, seems to shew, that in general where a power is given to the Court, it is to be exercised by them in the ordinary way in which the powers of the Court are exercised.

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PARKE, B.—I am of the same opinion. With respect to the first question, I should certainly have felt a doubt if this had been *res nova*. I think it is a very important rule in the construction of acts of Parliament, that they should always be read according to the grammatical construction, unless the doing so leads to some manifest absurdity. I should, therefore, have hesitated before I should have held this statute to embrace an action of covenant, though that case is clearly within the mischief intended to be remedied by the act. However, we are not called upon now for the first time to put a construction on the statute, because we have already a case decided upon it in this Court (*a*). I have myself frequently acted on it, and as it is a very salutary construction of the act, I am disposed to abide by it. The next question is, whether a Judge at Chambers has authority to act in such a case, and make such an order. I think that depends on the statute. An authority given to the Court by statute must be held to be intended to be exercised as the Courts usually exercise their jurisdiction, unless the statute contains something to the contrary. Where a Judge performs the functions of the Court, whether

(*a*) *Dixon v. Wigram*, 2 C. & J. 613.

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at common law or by statute, he does so under a delegated power, and he is placed in the same situation as the Court itself. When indeed a statute, as the 43 Geo. 3, c. 46, shews by the terms of it that the motion should be made in open Court, the authority of a Judge at Chambers is clearly excluded. In other cases where the Legislature has meant to confine the power to the Court, or to make a distinction between its authority and that of a single Judge, it has made its intentions apparent on the face of the statute. There is no such distinction made here, and I think, therefore, that the order was rightly made by a Judge at Chambers.

ALDERSON, B.—I quite agree that if the matter were *res nova*, it would be proper to consider it before giving a judgment. I think, however, that the words of the act would bear the construction put upon them by the defendant. At all events I consider myself bound by the authority of the case decided, and it is clearly a decision which carries into effect the real spirit and meaning of the act of Parliament. Substantial justice will be done in the present case, and one is very glad to find that there is such an authority on which to act. It would be very strange if the Legislature had intended to leave it in the power of any person, by merely changing the nature of the action, to avoid doing that which is just towards the other side. I decide, however, upon the authority cited. The next question I consider quite clear. Where the Legislature gives a power to the Court, unless it gives it on some specific terms, it is to be exercised as if we had it by the common law. The Legislature is presumed to know what the Court is in the habit of doing. If they mean to impose upon the power any particular mode of exercising it, they do so expressly by the act, and by many acts of Parliament it is so done. If limitations as to the mode of exercising powers are imposed by Parliament, they must be obeyed; but when there are no such limitations, the powers of the Court must be used in the usual way.

ROLFE, B.—I concur with the rest of the Court in the conclusion at which they have arrived. Whatever may have been the opinion of *Bayley, J.*, in the *Anonymous case* (a) cited, it is evident that this Court afterwards treated the matter as quite clear in *Dixon v. Wigram* (b), *Bayley, J.*, being then a Judge of this Court. It would be most mischievous indeed if we were to call in question principles which have been settled for many years, and upon which parties have no doubt acted very frequently. I rejoice to find this decision. Still I think if it were not there, it would be far from difficult to come to the same conclusion. Certainly the Legislature has expressed its meaning in a most imperfect way, but I think it means to include any action brought upon the mortgage deed itself. While, therefore, I think the defendant's position might have been sustained if the question had been now raised for the first time, I prefer to decide upon the authority of the former case, which has been acted upon for a long period, and is clearly in conformity with the spirit of the act. As to the other points I entirely agree with the rest of the Court.

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Rule discharged, with costs.

(a) 2 Chit. Rep. 264.

(b) 2 C. & J. 613.

SPINDLER, and JESSIE his Wife, v. GRELLETT.

S.C. 1. 1. 384.

DEBT. The declaration stated, that the defendant on, &c., while the female plaintiff was sole and unmarried, made his promissory note in writing, and then delivered

In an action
of debt the
declaration
stated that
defendant
made his

promissory note, &c., "and thereby promised to pay to the plaintiff Jessie, by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinbro., the sum of 200*l.*" &c. It was then averred that the said Jessie, while she was sole and unmarried, was always ready, and the plaintiffs since their marriage were always ready, to receive the amount of the said note, according to the tenor and effect of the said note, &c.: *Held* that the note, as pleaded, must be taken on general demurrer, to be payable "at 10, Duncan Street, Edinbro.," and that those words were not part of the description of the female plaintiff. And that, therefore, the declaration ought to have averred specifically a presentment at that particular place, and that such an averment was not implied in the averment of readiness to receive according to the tenor and effect of the note: *Held* also, that the note being non-negotiable, made no difference.

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the same to the said Jessie, and thereby promised to pay to her, by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinbro., the sum of 200*l*., by instalments of fifteen pounds per quarter, to commence on the first day of December then next, and so on until the said sum of 200*l*. should be paid. It then stated, that while the said Jessie was sole and unmarried, divers, to wit, seven of the said instalments had become due and payable, and that she the said Jessie, whilst she was sole and unmarried, was always ready to receive the said last mentioned instalments, according to the tenor and effect of the said note, and that since the marriage of the plaintiffs, which took place on the 10th day of October, A. D. 1842, and before the commencement of this suit, the residue of the said instalments, and of the said sum of 200*l*., in the said note specified, had become due and payable, and that the plaintiffs since that time have always been ready to receive the said residue and the said sum of 200*l*., according to the tenor and effect of the said note; of which said several premises the defendant, before the commencement of this suit, had notice, &c.

Second and third counts, and general breach.

General demurrer to first count, and joinder.

J. Addison, in support of the demurrer. The statute 1 & 2 Geo. 4, c. 78, does not apply to promissory notes, but only to bills of exchange. *Emblin v. Dartnell* (a) is precisely similar to the present case, and has been decided since that act passed. The older cases were also quite clear upon the point; *Rowe v. Young* (b); *Sanderson v. Bowes* (c). But it will perhaps be argued on the other side, that this note does not appear upon the declaration to have been made payable at any particular place, and that the words, "Miss Jessie Hope, at 10, Duncan Street, Edinbro.," are to be taken altogether as the description of the payee. It will be said, that where words are capable

(a) 12 M. & W. 830; S. C.
ante, vol. 1, p. 1010.

(b) 2 Brod. & B. 165.
 (c) 14 East, 500.

of bearing different meanings, that one must be selected which will give effect to the instrument declared upon. But it is submitted that these words are not capable of two interpretations, and that their meaning is plain and obvious. The result of them to a common understanding is, that the bill is payable at the particular place mentioned. Suppose the note had been stated to have been payable generally, and upon production it had appeared to be in these words, there would have been a variance. It is a rule of pleading, that a pleading is to be interpreted most strongly against the party from whom it comes; *Rex v. Stevens* (a); *Fleetwood v. Curley* (b).

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Needham, contra. It is submitted that the words "at Duncan Street," &c., are only part of the description of the female plaintiff. "At" is often used, especially in Scotland, as a word of description only; and following, as it does here, immediately after the rest of the lady's description, it must be taken to be part of it. If the words had followed the promise to pay, they might have borne the meaning now contended for on the other side. But even if the words are capable of two meanings, the declaration is only objectionable on special demurrer. On general demurrer that sense must be adopted which supports the pleading. [*Pollock*, C. B.—If it is only uncertainty, there should have been a special demurrer.] But even if the words do apply to the place of payment, it is submitted that as this was a non-negotiable instrument, there was no necessity for presentment at all according to the custom of merchants; *Wain v. Bailey* (c); and therefore the cases cited do not apply. [*Pollock*, C. B.—Is there any authority for saying, that if a man stipulates to pay at a certain time and a certain place, he is not as much entitled to the benefit of the place as of the time? *Wain v. Bailey* only decides that a non-negotiable instrument need not be pro-

(a) 5 East, 244; S. C. 1 Smith, 437.

(c) 10 A. & E. 616.

(b) Hob. 267.

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duced, because the maker cannot be called on to pay it to any one else. Although a non-negotiable instrument may not be governed by the custom of merchants, it must surely be governed by the express contract between the parties.] If presentment is necessary, then it is sufficiently stated upon general demurrer. There is an averment of readiness and willingness to receive according to the tenor and effect of the note, which necessarily involves a due presentment; *Huffam v. Ellis* (a).

Addison, in reply, cited *Thornton v. Adams*, per *Bayley*, J. (b), and *Dovaston v. Payne* (c).

POLLOCK, C. B.—Our judgment must be for the defendant. The question is, what we are to consider to be the effect of this note, as stated in the declaration. I think the effect of the note is, that the defendant promised to pay at the particular place. We must next consider what is the legal effect of such an instrument. The act of Parliament 1 & 2 Geo. 4, c. 78, does not affect promissory notes at all, and, therefore, they must still be presented at the places where they are made payable, just as they were before the statute. Mr. *Needham* contended that there was a distinction in this respect between negotiable and non-negotiable instruments, but the case he has cited fails to shew such a distinction as he has contended for; and I think that where the contract is between the original parties only, it is more reasonable to require a presentment at the place stipulated for by both of them. Then it was contended that the presentment is to be presumed, because the plaintiffs say they were always ready and willing to receive the money according to the tenor and effect of the note. I do not think that is sufficient, and I think the want of an express averment of presentment is fatal, and that our judgment must be for the defendant.

(a) 3 Taunt. 415.

(b) 5 M. & S. 38.

(c) 2 H. Bl. 527.

ALDERSON, B.—I agree with the Lord Chief Baron. I think we must construe this declaration according to the English language, and you cannot do that without coming to the conclusion that the note was payable “at Duncan Street, Edinburgh.” If the plaintiffs think that the word “at” in the note means “of,” they ought to have so declared upon it, and raised that question before a jury, who would have had no difficulty in coming to a conclusion upon it. I do not think the declaration contains anything which can be tortured into an averment of either presentment or demand.

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ROLFE, B.—I am of the same opinion. I think it impossible to torture the words into the construction given to them by Mr. *Needham*. He says they may mean Miss Jessie Hope, *of or living at* 10, Duncan Street, Edinburgh. That is an interpretation which I cannot admit. Then it is said, it is not necessary to aver presentment of a non-negotiable instrument. But that conclusion cannot be drawn from *Wain v. Bailey (a)*. Then the last point is an attempt to extract from the words of the declaration something which they were never intended to mean, and to argue that the averment, “that the plaintiffs were always ready and willing to receive the amount of the note,” is equivalent to an allegation of presentment. I cannot think so, and I am of opinion that the first count is bad for want of such an allegation.

Judgment for Defendant.

(a) 10 A. & E. 616.

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S.C. 1: Lushk. 295.

FEWINGS v. TINDAL.

A claim for a month's wages by a menial servant on dismissal without warning and without cause, cannot be recovered under the common indebitatus count for work and labour.

ASSUMPSIT for work and labour as a domestic servant, and on an account stated.

Plea. Non assumpsit.

The cause was tried before the undersheriff at Bristol, when it appeared that the action was brought by the plaintiff to recover a month's wages, on the ground that she had been dismissed from the defendant's service without the month's notice, to which her contract entitled her. The undersheriff thought that the month's wages could not be recovered as for work and labour, but ought to have been the subject of a special declaration on the contract. The plaintiff was therefore nonsuited.

M. Smith subsequently obtained a rule for a new trial.

Greenwood now shewed cause. The plaintiff cannot recover the month's wages under this contract upon a declaration for wages. There has been no work done, or service rendered, in respect of which wages are due. There are, undoubtedly, authorities which point both ways, but the defendant is right in principle, and the cases in which the view contended for by the plaintiff has been taken, appear to have been induced by a desire to avoid individual hardship. *Archard v. Hornor* (a) is exactly in point, and distinctly in favour of the defendant. *Gandell v. Pontigny* (b) differs from this case, because there had been there an actual tender and readiness on the plaintiff's part to perform the services for which he had contracted. So far, however, as it is an authority against the defendant, it is overruled by *Archard v. Hornor*. It may be that the

(a) 3 C. & P. 349.

(b) 4 Campb. 375.

defendant is liable to pay the month's wages on this contract, but he is to pay it as a penalty for the dismissal, and not as wages for services never rendered. [*Parke*, B.—The difficulty is, that the plaintiff has not done any work. She is entitled to recover something, not for work done, but on a different contract; *Eardley v. Price* (a)]. If the plaintiff had been hired upon these terms, and never taken into the service at all, could she then have recovered in this action for work done, she never having done anything; *Hartley v. Harman* (b); *Beeston v. Collyer* (c).

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M. Smith, in support of the rule. The plaintiff was entitled to a verdict. The effect of the contract is to raise the price of the services in case of an improper dismissal. [*Parke*, B.—There is no doubt of the defendant's liability, but the question is, whether he is to pay for services, or for an improper dismissal or refusal to employ.] The master contracts to give a month's notice, or to pay a month's wages. He referred to *Smith v. Kingsford* (d) as in point.

POLLOCK, C. B.—The rule must be discharged. The wages in this case should have been the subject of a special count, and cannot be recovered as for work and labour. The right to recover a month's wages for being turned away without notice is not the same as the right to recover wages for work and labour actually performed. Each of these rights may be enforced in its proper manner, but we cannot, for the sake of doing what appears to be justice in the particular case, break in upon the rules of law, or substitute one contract for another. The plaintiff has a proper mode of enforcing her claim. She has, however, adopted an improper one, and we have no alternative in

(a) 2 New Rep. 333.

(b) 11 A. & E. 798; S. C. 3 P. & D. 567.

(c) 4 Bing. 309; S. C. 12 Moore, 552.

(d) 3 Scott, 279.

of which said proposed company or partnership undertaking was to consist of a certain sum of money, to wit, one million sterling, to be divided into fifty thousand shares of 20*L* each, and upon which a deposit of 2*L* 2*s*. for each and every share was to be paid by such persons respectively as should apply for, and to whom the said shares should be allotted by a committee of management of the said proposed company. It then alleged, that before and at the time of the defendant's application for shares, and the making of his said promise as hereinafter mentioned, the plaintiffs formed and were the committee of management of the said proposed company, and that before the making of the promise by the defendant as hereinafter mentioned, to wit, on, &c., the defendant applied to the plaintiffs, then forming and being such committee of management as aforesaid, and requested them to allot him, the defendant, fifty of the said shares in the said proposed company, and then undertook to accept the same, or any less number that might be allotted to him. And thereupon heretofore, to wit, &c., the plaintiffs, at the request of the defendant, allotted to him thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*L* 2*s*. upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*L* 10*s*., should be paid by the defendant on or before the 9th day of December, 1845, to the account of the said company, to one of certain bankers then appointed and agreed upon in that behalf, to wit, &c.; of all which premises the defendant afterwards, to wit, on the day and year last aforesaid, had notice. And thereupon in consideration of the premises, and that the plaintiffs, at the request of the defendant, then, to wit, on the day and year last aforesaid, promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs to perform and fulfil the said terms on his the defendant's part. And although the plaintiffs were always

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ready and willing to perform and fulfil the said terms in all things on their part, and although the said ninth day of December elapsed after the said promise of the said defendant, and before the commencement of this suit, of all which premises the defendant hath always had notice. Yet the defendant, disregarding his said promise, did not nor would, before the said ninth of December, pay, nor hath he since paid, to any or either of the said bankers, or at any of their banks either in London or elsewhere, or to any other person to the account of the said company, the said deposit of 2*l.* 2*s.* per share, but hath wholly neglected so to do. By means of which said premises, &c.

Special demurrer, assigning for causes, among others, that the only consideration stated for the promise declared on is, the allotment to the defendant of shares in a company which the plaintiffs and others, at some time before the making of the promise, had agreed with each other to endeavour to form, but which said agreement, and the formation of the said company, and all endeavours to form the same, may (consistently with the said declaration) have been given up and abandoned long before the said allotment or promise, and that such consideration is insufficient to sustain the said promise: that the declaration is wanting in certainty, in not stating whether the formation of the company commenced before or after the coming into operation of the statute 7 & 8 Vict. c. 110; and that if the formation of the company commenced before the coming into operation of the said statute, all the several parties to the agreement for the formation, and not the plaintiffs alone, ought to have sued in this action; and if the formation commenced after the said act came into operation, then the declaration ought to have shewn that the plaintiffs were, according to the act, entitled to allot shares and receive deposits, and that the deposits sued for are such as the act authorizes: that the declaration ought to have shewn with certainty that the defendant accepted the allotment: and that the declaration ought to have stated with certainty

the terms which the plaintiffs are alleged to have promised to fulfil and to have been ready and willing to fulfil.

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Butt (with whom was *Maynard*) in support of the demurrer. The declaration does not shew that the company was ever provisionally registered under the provisions of the statute 7 & 8 Vict. c. 110. [*Pollock*, C. B.—If the defendant seeks to set up the illegality of the contract as an answer to the action, he ought to have pleaded it.] It is submitted that the performance of the provisions of the act is a condition precedent to the right of action. Again, the declaration shews, that if any contract was made with the plaintiffs at all, it was made with them as the committee of management, that is, as agents on behalf of themselves and all the persons joined with them in the undertaking; *Woolmer v. Toby* (a). The deposits sued for were to be paid to the account of the company, not to that of the plaintiffs. Another objection is, that for anything which appears in the declaration, the company may have been altogether abandoned before any allotment was made to the defendant. Also, it does not appear that the allotment when made was ever accepted. Nor is there any consideration sufficiently shewn for the promise alleged. The only consideration stated is the promise of the plaintiffs “to perform and fulfil the said terms on their part;” but it does not appear that there were any terms to be fulfilled on their part, and if there were, it ought to have been shewn with certainty what they were. How could the defendant take issue upon the averment of performance, or of readiness and willingness to perform terms which are not specified? Unless they were stated, it does not appear whether they are conditions precedent to the promise of the defendant, or not.

J. Brown (with whom was *Martin*), contra. It is not an objection to this declaration that it does not shew the com-

(a) Q. B. Trinity Term, 1847, cited from 16 Law Jour. N. S., Q. B. 225.

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pany to be provisionally registered under the Joint Stock Companies' Statute, 7 & 8 Vict. c. 110. It is expressly provided by that act, that it shall only apply to companies formed after a certain date, that is to say, after the 1st of November, 1844, on which day the act came into operation. It is quite consistent with this declaration that the company may have been formed long before that date. But it is also an answer to this objection that, if there is anything in it, it goes to shew the contract to be illegal, and, therefore, it ought to have been pleaded if intended to be relied upon. *Daintree v. Hutchinson* (a) is one of a class of cases which shew that illegality must always be pleaded. [*Pollock*, C. B.—A very familiar case is that of a plea under the Apothecaries' Act. That act says, that persons shall not act as apothecaries without having passed a certain examination, unless they commenced business before a certain time. Persons who did commence business before that time are not called upon to aver that fact.] It is illegal to carry on the trade of a broker in London without certain licenses, but it is never averred in a declaration by a broker that he has such licenses. The present contract might have been made with perfect legality by the plaintiffs at common law, and where a statute imposes certain conditions upon the performance of an act previously legal, that makes no alteration in the mode of pleading; *Bac. Abr.* tit. "Stat." (L. 3). The rule is best stated in *Stephen on Pleading*, 4th ed. p. 402 (b), as follows:—"Where a thing is originally made by act of Parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands, it must be alleged to have been made in writing; but where an act makes writing necessary to a matter where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the Statute of Frauds, it is not necessary to plead the thing to be in writing,

(a) 10 M. & W. 85.

(b) Quoting from 1 Saund. 276 d, c, n. (2).

though it must be proved to be so in evidence." It is not necessary to allege that a theatre is duly licensed, in an action upon a contract for performance, though without the license the contract would be illegal; *Astley v. Weldon* (a). He also cited *Cope v. Rowlands* (b). [He was stopped by the Court upon this point.] The next objection is, that the declaration shews no circumstances from which the promise can be implied to have been made to the plaintiffs. It is said that the company was formed of a great number of persons, and that if any action at all can be maintained, the whole of them ought to have joined in it. *Woolmer v. Toby* (c) was cited in support of this part of the argument, but it is no authority at all, because no question of pleading was there decided. The whole matter arose upon the evidence. It is then said that the company may by possibility have been extinguished before the allotment of these shares, and that that possibility ought to have been negatived; but it is an old rule of pleading, that things are to be presumed to continue in the same state till the contrary appears. The next point is, that the defendant is not shewn to have accepted the allotment made to him; but it is stated to have been made at his request. The last objection is, that it is not shewn what are the terms to be performed, or that there are any terms to be performed on the part of the plaintiffs. [*Pollock*, C. B.—Is not one of the terms that they shall keep accounts open at the several bankers?] It does not follow that there were any terms other than those stated in the declaration, and if there is any averment from which that may be implied, it may be rejected as surplusage.

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Maynard, in reply. The declaration ought to have shewn the due registration of the company, which is a condition precedent to the action. In *Com. Dig.* tit. "*Pleader*," (C. 76), it is laid down, that "in all cases where any cir-

(a) 2 B. & P. 346.

cited from 16 Law Jour. N. S.,
Q. B. 225.

(b) 2 M. & W. 149.

(c) Q. B. Trinity Term, 1847,

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cumstances are required by the purview of an act to make it good, they ought to be averred: as where the statute 1 Rich. 3, 1, makes a feoffment, &c. by cestui que use, of full age, sane, and at large, &c., good; he, who pleads a feoffment by cestui que use, ought to aver that he was sane, of full age, and at large." All the precedents of pleadings on contracts for the sale of stock contain averments of possession in the party selling, to avoid illegality under 7 Geo. 2, c. 8. As to the second objection, the consideration proceeds from, and the contract was made with the entire company, and the money is to be paid to them, and they ought, therefore, all to have been joined as plaintiffs; *Bowen v. Morris* (a). *Woolmer v. Toby* (b) is precisely in point; and it makes no difference that the point arose there upon the evidence, and here on the pleadings; the question is the same. The last objection is, that the declaration does not shew what the terms were. The omission to set out these terms makes the declaration bad for uncertainty. *Figes v. Cutler* (c) shews, that an action cannot be maintained for a breach of a contract to enter into partnership, without shewing the terms of the contract. *Beech v. White* (d) shews, that the whole consideration should be stated, and is in conformity with the clear rule of pleading. He referred to *M'Neill v. Reid* (e); *Cousins v. Nantes* (f); *Craufurd v. Hunter* (g).

POLLOCK, C. B.—I am of opinion that our judgment should be for the plaintiffs. There are two objections upon matters of substance. It is said that, since the Joint Stock Companies' Act, a company cannot be legally formed except under the provisions of that act; and that it is not shewn that this company was ever provisionally registered, as is

(a) 2 Taunt. 374.

& D. 399.

(b) Q. B. Trinity Term, 1847,
 cited from 16 Law Jour. N. S.,
 Q. B. 225.

(e) 9 Bing. 68; S. C. 2 M. &
 Scott, 89.

(c) 3 Stark. 139.

(f) 3 Taunt. 513.

(d) 12 A. & E. 668; S. C. 4 P.

(g) 8 T. R. 13.

there required. The answer to that is, that it does not appear that the company was not formed before the passing of the 7 & 8 Vict. c. 110. This objection should have been made by way of plea. It is urged that the company ought to have shewn in their declaration when they were formed, because, unless they were in existence before the act, they could have no power to allot shares or to maintain this action. But I think that is not well founded. The second substantial objection was, that the plaintiffs were jointly interested with a large number of other persons, and that all the persons from whom the consideration for the promise proceeded ought to have sued. It appears to me, however, that there is here a contract between the plaintiffs and the defendant, upon which the plaintiffs may sue without joining all the members of the company. There is a consideration shewn in respect of which the plaintiffs may have a sufficient interest. It may turn out otherwise on evidence, but on the face of this declaration there is a sufficient consideration stated to support the promise made by the defendant. The question is, not to whose account was the money to be paid, but to whom was the promise actually made? If a promise is made to A. B. to pay money to C. D., it is A. B. who must sue for the breach of it, and not C. D. The principal point of form to which our attention has been drawn is, that the terms which were to be performed by the plaintiffs are not set out as it is contended that they should have been. I do not think the declaration is open to that objection. I forbear to give any opinion on what would be the effect of a declaration which referred to certain terms as part of the consideration, and did not set them out. I do not say what would be the effect of such an omission if specially pointed out by demurrer. In *Cryps v. Baynton* (a), it was held, that in an action upon a promise of the defendant to pay for necessaries supplied to a third person, the declaration, which averred that necessaries were

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(a) 3 Bulst. 31.

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provided, was good, without shewing what necessities were supplied. But this question really does not arise here, because there are sufficient terms stated in this declaration. The allegation is, that "the plaintiffs allotted to the defendant thirty-five of the said shares in the said company, upon certain terms then agreed upon by and between the plaintiffs and the defendant, that is to say, that a deposit of 2*l.* 2*s.* upon each and every of the said shares so allotted to him as aforesaid, making in the whole a large sum of money, to wit, the sum of 73*l.* 10*s.*, should be paid by him, the defendant, on or before, &c., to the account of the said company, to one of certain bankers then appointed," &c. It then goes on to aver, that "in consideration of the premises, and that the plaintiffs, at the request of the defendant, then promised the defendant to perform and fulfil the said terms on their part, the defendant then promised the plaintiffs," &c. Mr. *Maynard* objects that there may be more terms, but that is not a point which can be made available on demurrer. It cannot be assumed that there are other terms than those which are stated. If there were any, and the cause had gone to trial upon non assumpsit, there would have been a variance which would have entitled the defendant to succeed. If these terms either expressly or impliedly call on the plaintiffs to do anything, they were bound to do it; but if the terms require nothing to be done, then, of course, the plaintiffs cannot be bound to do anything, and the mention of the terms at all was wholly superfluous. In my opinion there was an implied promise to do something. I think there was an implied promise to keep an account at the bankers, or give notice of any change. We cannot, therefore, consider the allegation as mere surplusage. I think there is no well founded objection to this declaration, and our judgment must be for the plaintiffs.

ALDERSON, B.—The first objection made to the declaration is, that it does not shew the provisions of the 7 & 8

Vict. c. 110, to have been complied with, and that without such compliance the allotment of shares, and the whole transaction mentioned in the declaration, would have been illegal. But as the illegality has not been pleaded, I think this objection cannot be raised. It is not open to the defendant on demurrer. The illegality ought to have been put upon the record by him, and, in the absence of that, we must presume the transaction to have been a legal one, as there are several states of facts in which it may have been so. The company may have been formed before the act came into operation. I do not think that *Woolmer v. Toby* (a) is at all applicable to this case. There the question arose entirely upon the evidence. The contract was stated to have been made with one set of persons, but at the trial it turned out to have been actually made with another set. Here it is stated on the face of the declaration that the contract was with the present plaintiffs, and that is admitted by the demurrer. It may be that, upon a trial, the result here might be the same as in *Woolmer v. Toby*; but as the record stands at present, it is not open to the defendant to raise that question. The formal objections to the declaration also appear to me to fail. I should have thought it worthy of consideration whether, if the declaration had merely stated that the plaintiffs were to perform "certain terms" on their part, the declaration might not have been bad on special demurrer, for not setting out the terms to be performed by the plaintiffs. But the consideration alleged is, that "the plaintiffs, at the request of the defendant, promised the defendant to perform and fulfil *the said terms*," which refers to the terms previously stated in the declaration.

ROLFE, B.—I am of the same opinion. One objection which has been urged to the declaration is, that the contract should have been alleged to be made with the company,

(a) Q. B. Trinity Term, 1847, cited in the argument from 16 Law Jour. N. S., Q. B. 225.

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and not with the committee of management. It does not even appear that the committee constituted any part of the company; and there is no reason why a contract should not be made with one person to enure to the benefit of another; and if so, the person with whom the contract was made would be the proper person to sue for any breach of it. This may have been in truth a contract with the company; but, upon the facts as now stated, it appears to have been with the committee, and there is nothing to shew that they might not make it. Then it is said, that under the provisions of the 7 & 8 Vict. c. 110, this is not shewn to be a legal company in which shares could be legally allotted. It is, however, a perfectly good contract at common law, and all that can be said is, that if it was made after the passing of the statute it would be illegal, unless its provisions were complied with. But how can we presume anything of that sort? The illegality, if any, ought to be shewn by the party who seeks to rely upon it. The only objection which at all created any doubt in my mind was the one which is specially pointed out, that the terms to be performed by the plaintiffs are not sufficiently shewn. I think, however, the declaration shews that there are no other terms but those mentioned, and the words which appear to refer to other terms may be rejected, as was done in *Ring v. Roxbrough (a)*. That case decided, that where a bad consideration is joined with a good one, which of itself is sufficient to support the promise, the other may be rejected as surplusage. I think here there is a good and sufficient consideration alleged, and the residue may be treated as surplusage, and rejected.

Judgment for the Plaintiffs.

(a) 2 C. & J. 418.

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WILLES moved to rescind an order made by a learned Judge at Chambers for the discharge of the defendant out of the custody of the sheriff of Yorkshire.

The defendant had been arrested under a ca. sa. on the 2nd of September, 1847. On the 3rd of September, a summons for the defendant's discharge was taken out, supported by affidavits, which shewed that on the 28th of July, the defendant was returned as member of Parliament for the borough of Finsbury. Parliament had been dissolved on the 23rd of July, and writs issued for a new election, returnable on the 21st of September. At the time of the arrest, the new Parliament had not met, but stood prorogued to the 12th of October. On the 7th of September, the learned Judge before whom the summons was heard made the order for the discharge of the defendant out of custody, which it was now sought to rescind.

A member of the House of Commons is privileged from arrest under a ca. sa. for forty days before and forty days after each meeting of Parliament. And the privilege is equally applicable to the meeting of a new Parliament after a dissolution, as to the meeting of a Parliament after a prorogation.

Willes. It is submitted that this order must be rescinded. The defendant was not privileged at the date of the arrest. The case of *Mr. Martin*, A. D. 1586, mentioned in *Bac. Abr.* tit. "*Privilege*," (C. 4.) (a), and in *Dewe's Journal*, 410, 414, shews that the House of Commons did not then claim any particular time of privilege before the meeting, and after the dissolution of Parliament, but only claimed a "convenient" time. The House itself is the only judge of what is a "convenient" time. The authorities upon the subject are all collected in a work on the Law of Parliament, published in 1844, by Mr. Thomas Erskine May. *Prynne* (b) states no definite time, nor has the law of Parliament established any definite time of such privilege. In the *Earl of Athol v. Earl of Derby* (c), it is said, that the House of Commons claimed forty days before and forty days after each session, but no decision of their own to that effect

(a) *Gwillim and Dodd's* edition.

(c) 2 Lev. 72.

(b) 4 *Prynne Reg.* 1216.

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is referred to. There are several Irish acts of Parliament which fix that as the time, and from them probably has arisen the general belief which undoubtedly exists in a privilege lasting forty days. The Court of King's Bench in *Colonel Pitt's case* (a), held the defendant entitled to his privilege, on the ground that he had not had sufficient time to return from Parliament, but they did not decide upon any definite time during which the privilege would last. The sole object of the privilege is to protect the member *eundo*, *morando*, *et redeundo*, and in the present state of travelling, it is wholly unnecessary that so much as forty days should be given when a person can come from or go to the furthest part of the kingdom in a tenth part of the time. [*Parke, B.*—The reason why the teste of an original writ was fifteen days was, because that time was supposed by the common law to be sufficient time to come from any part of the kingdom to Westminster, and you cannot say that because of the greater expedition of modern travelling, less time is to be given.] The question was raised, but not decided, in *Butcher v. Steuart* (b). The privilege hitherto claimed by the House of Commons has been for a "convenient" time only; and, as it is intended to protect the members *eundo*, *morando*, *et redeundo*, there is no reason why it should extend to a defendant who is neither attending Parliament, nor on his road to or from his Parliamentary duties. In all the analogous cases of witnesses and persons in attendance on Courts of Justice, they are only privileged while actually there, or while in the act of going or returning. The House of Commons itself claims only a reasonable time, and if this Court proceeds to define the time, it will be giving to the defendant a greater privilege than is claimed by the House to which he belongs. But in addition to the question of time, there is no instance of privilege having been allowed after a dissolution of Parliament and before the meeting of a new one. In *Sir Richard Temple's case* (c), where an application to the Court

(a) 2 Stra. 985.

ante, vol. 1, p. 308.

(b) 11 M. & W. 857; S. C.

(c) Sid. 42.

to stay the trial was made, on the ground of his having been elected to serve in a new Parliament which had not yet met, the Court intimated in their judgment a doubt whether they had any power to discharge the defendant if taken in execution, and said the application should be made to the Parliament after its meeting.

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POLLOCK, C. B., afterwards delivered the judgment of the Court.—This was a motion to set aside an order of my Brother *Williams* discharging the defendant (who had been taken in execution on a *capias ad satisfaciendum*) out of custody, on the ground of the privilege of Parliament. We took time to consider whether we should grant a rule to shew cause, in order to have an opportunity of referring to the authorities, and to my Brother *Williams*. We are of opinion that the order was right, and, consequently, there ought to be no rule. The date of the order was the 7th of September. The summons on which it was made having issued on the 3rd, and the prorogation of Parliament being to the 21st, the interval was less than twenty days (*a*).

It was contended by Mr. *Willes*, that the privilege of a member to be free from arrest exists not for any certain time before or after the meeting of Parliament, but for a *convenient* time; and that at the present day, the time in question was more than a convenient time. It was further contended, that the privilege was not applicable to the meeting of a new Parliament after a dissolution.

In the first place, we think there is no foundation for the latter point; whatever privilege necessary to secure their attendance may belong to members of Parliament between a prorogation and the next meeting of Parliament, we think must belong to them before they assemble, upon a summons after a dissolution. Whatever reasons apply to the one case equally apply to the other, and we think the law or rule of privilege must be the same in both.

(*a*) See, however, the statement of facts, *ante*, p. 209. (Note by reporters.)

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The question then is, what is the privilege of Parliament with reference to freedom from arrest? In *Blackstone's Commentaries*, vol. 1, p. 165, it is said, that in case of a commoner, this privilege from arrest extends to forty days after every prorogation, and forty days before the next appointed meeting. In *Bac. Abr.* tit. "*Privilege*," (C), the authorities are collected. It appears that in an old Irish statute, 3 Edw. 4, c. 1, the privilege is expressly limited to forty days before and forty days after the meeting of Parliament. In the case of the *Earl of Athol v. Earl of Derby*, cited by *Blackstone*, and which occurred in the 24 Car. 2 (1672) it is stated that the commons claimed forty days before and forty days after each session. In *Jenkins*, 3rd Cent., case, 35, p. 118, it is said, that the privilege extends to forty days before the Parliament, and forty days after.

Mr. *Willes* contended that the period was not a definite but a convenient period. It may be that the rule was originally during a convenient period, and the case cited from *D'Ewes's Journal* (which is given at large in *Bac. Abr.*) (a) has some tendency to support this view, but it is consistent with this, that for some centuries the period of forty days has been deemed a convenient period. The House of Commons (as might be expected) determined only the question before them, and did not define the limit of convenience, but held twenty days to be within it. The 12 & 13 Wm. 3, c. 3, more than once mentions "the time of privilege," but does not mention the duration of it; but the 4 Geo. 3, c. 24, s. 1, which first regulated the privilege of franking, limits that privilege to the session of Parliament, and forty days before and forty days after any summons or prorogation. The same provision is to be found in the 24 Geo. 3, c. 37, s. 7, and the privilege so limited was continued by several statutes (one of which passed since the Union) till the privilege of franking was abolished.

(a) Tit. "*Privilege*" (C. 4.) *Gwillim* and *Dodd's* edition. (Note by reporters.)

We think that the conclusion to be drawn from all that is to be found in the books on the subject is this; that whether the rule was originally for a convenient time, or for a time certain, the period of forty days before and after the meeting of Parliament has, for about two centuries at least, been considered either a convenient time, or the actual time to be allowed. Such has been the usage and the universally prevailing opinion on the subject, and such, we think, is the law. If any change is necessary or desirable, we are not competent to make it.

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Rule refused.

THOMPSON v. LANGRIDGE.

1 C. 1. 244 R. 354.

THIS action was commenced by issuing a writ of summons on the 29th of April, 1840. The writ was served on the 6th of May following. Three days afterwards, before appearance was entered, the defendant gave the following cognovit:—

After writ issued, and before appearance entered, the defendant gave a cognovit in the common form. Upwards of seven years afterwards, the plaintiff entered an appearance for the defendant in the action, and signed judgment on the cognovit. *Held*, that he might properly do so without giving a Term's notice, or applying for leave to the Court or a Judge.

“In the Exchequer.

“I, John Langridge, do confess this action, and that the plaintiff hath sustained damages to the amount of 100*l*., besides his costs of suit.

“Dated this 9th day of May, 1840.

“JOHN LANGRIDGE.”

This cognovit was attested in the usual form. On the 10th of May, 1847, the plaintiff wrote to defendant, demanding a settlement, and stating that he should proceed on the cognovit. On the following day, the plaintiff entered an appearance for the defendant, and signed judgment. On the 15th of May, a *ca. sa.* issued, upon which the defendant was arrested. On the 19th of May, the defendant

A party coming to the Court to rescind an order of a learned Judge, and succeed-

ing, will not be allowed to make a subsequent separate application to have the costs repaid, which he has paid under the Judge's order.

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took out a summons to set aside the appearance, judgment, and subsequent proceedings, with costs; and to discharge the defendant out of the custody of the sheriff of Middlesex. *Platt*, B., made an order accordingly, with costs. A rule nisi was subsequently obtained to rescind that order, against which,

Willes shewed cause. The cognovit in this case was upwards of seven years old when the judgment was signed. If the plaintiff can sign judgment after this lapse of time, and issue execution *instantly*, he would be in a better position than if he had got a final judgment in a hostile action, because he must then, after a year and a day, have resorted to a sci. fa. before issuing execution. This appearance was entered in direct contravention of the rule of Hilary Term, 2 Wm. 4, r. 35, under which the plaintiff is to be deemed out of Court, unless he declare within a year after the return day of the process. The cause was, therefore, out of Court before the entry of the appearance. At all events, the plaintiff was bound to give a Term's notice before proceeding, after so long an interval. There can be no judgment without an appearance, and as the rule of Court has taken away the right to enter one after such a lapse of time, there can be no judgment at all; *Roberts v. Spurr* (a). It is also contended that the Reg. Gen., Hil. Term, 2 Wm. 4, r. 73, which says, that "leave to enter up judgment on a warrant of attorney above one and under ten years old, must be obtained by a motion in Term, or by order of a Judge in Vacation," applies to the case of a cognovit. It was held in *Webb v. Aspinall* (b), that a cognovit was within the rule of Hilary Term, 14 & 15 Car. 2, in which warrants of attorney only were named.

Bramwell, in support of the rule. It is not necessary that there should be any declaration in fact before signing judgment

(a) 3 Dowl. 551.

(b) 7 Taunt. 701; S. C. Moore, 428.

on a cognovit. The defendant, by giving the cognovit, admits that there is one. The rule cited of Reg. Gen., Hil. Term, 2 Wm. 4, has no application to a case where no declaration is necessary. In this case, as the plaintiff was not bound to declare at all, it cannot be necessary for him to do it within a year. It was argued on the other side, that the 73rd rule of Hilary Term, 2 Wm. 4, applies to cognovits, though it mentions warrants of attorney. But the rule preceding it mentions both cognovits and warrants of attorney expressly, so that the framers of the rules must be taken to have left out cognovits intentionally from the latter rule. No Term's notice was necessary here. That is only required when the step to be taken by the one party will call for something to be done by the other.

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The judgment of the Court was delivered by

POLLOCK, C. B.—In this case we are of opinion that the rule should be made absolute. The question turns upon this, whether, where a cognovit is given before there is an appearance, and upon which nothing has been done for more than a year, it is open to the plaintiff to act upon the cognovit without a Term's notice, and without any application to the Court or a Judge, on the part of the plaintiff, for leave to enforce the cognovit. Now, a cognovit certainly may be given before appearance, and it contains an implied authority to enter the appearance. It admits a cause of action stated upon the record, in the form of a declaration; and though there be not one, it is an admission on the part of the defendant which operates as if there was one. There is, therefore, an authority to enter an appearance. If there had been an appearance and a declaration, and then a cognovit, it seems to be clear that no Term's notice would be necessary, and that a party would not be prevented by any lapse of time from entering up judgment on the cognovit. It appears to us, that the absence of a declaration in this case cannot be successfully relied upon, because the defendant admits, in fact, that there is a decla-

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ration;—that there is a cause of action on the record; and that is an implied authority to the other side to enter an appearance, and to proceed to judgment, exactly as if there was a declaration. Neither the rule of Court, Hil. Term, 2 Wm. 4, r. 35, nor any statute, nor any analogy arising out of the case cited of *Webb v. Aspinall* (a), seems to us to apply. We think, therefore, the order made was not a correct one, and the rule for setting it aside must be made absolute.

Rule absolute.

On a subsequent day in Hilary Term, 1848,

Bramwell applied for a rule to shew cause why the costs, which had been paid by the plaintiff to the defendant under the rescinded order of *Platt*, B., should not be repaid. The answer to the application will probably be, that it ought to have been embodied in the first rule; but it is submitted the Court will not put the plaintiff to his action for money had and received, where the money has been taken out of his pocket by the order of the Court itself.

PARKE, B.—You ought to have asked for the return of the money in the first instance. It is vexatious to split your application.

ALDERSON, B.—If we were to grant your present application, it would give power to every attorney to increase costs, by splitting applications into parts which ought to be made in one. It is much better to lay down a rule that everything which can be granted shall be asked for at once.

PER CURIAM.

Rule refused.

(a) 7 Taunt. 701.

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ORGILL v. BELL.

S. C. 1-Exch. R. 1466.

THIS was a rule obtained by *Crouch* on behalf of the plaintiff, calling on the defendant to shew cause why an order made by *Platt*, B., should not be rescinded.

The action was brought for a sum under 20*l.*, and a writ of trial having been obtained, the plaintiff gave notice of trial for a day when the Court sat only to try causes adjourned from a previous day. The cause was, however, then tried, notwithstanding a protest by the defendant's attorney against the sufficiency of the notice, and a verdict found for the plaintiff. On the 6th of July, 1846, the defendant took out a summons to set aside the verdict and subsequent proceedings, and *Platt*, B., made an order accordingly.

The present rule was applied for on the last day of Trinity Term, 1847, the defendant having, in Hilary Term, 1847, obtained a rule for judgment as in case of a non-suit, which was subsequently discharged in Easter Term of the same year, by the plaintiff, no one appearing in support of it.

C. C. Jones, Serjt., now shewed cause. In order to sustain this rule, the other side must maintain that the order of *Platt*, B., was a nullity. If it was only irregular, they come too late to rescind it on that ground. A Judge has clearly jurisdiction to set aside a verdict at nisi prius, and there is nothing in the statute 3 & 4 Wm. 4, c. 42, which prevents him from exercising the same power over a verdict given before the sheriff. It is true that the statute expressly gives him the power of staying the immediate execution which would otherwise follow a verdict on a writ of trial, but it does not, by doing so, take away his power over the verdict. It may be that the Judge has here exercised his jurisdiction improperly, but in that case the party complaining was

A Judge at Chambers having made an order to set aside a verdict for the plaintiff on a writ of trial, on the ground of an insufficient notice of trial: Held, that the Judge's order was an irregularity only, and not a nullity; and, therefore, might be waived.

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bound to come to the Court forthwith, and, by not doing so, he has waived his cause of complaint.

Crouch, in support of the rule. The Judge had no power to make this order. It is a nullity. The power of the Judge is limited by the eighteenth section of the 3 & 4 Wm. 4, c. 42.

POLLOCK, C. B.—This rule must be discharged. It was the duty of the party to have come in Michaelmas Term, 1846. Instead of doing this, he waits till an application is made by the other side for judgment as in case of a nonsuit in Hilary Term, 1847, which stood over till Easter Term. Even then he does not make this application till the last day of Trinity Term. I think that that was too late.

ALDERSON, B.—I have no doubt that this order was an irregularity which would have been set right if the application had been made in proper time. It is not, however, a nullity. There must be some end to litigation, and the usual rule in cases of irregularity, that the complaining party must come in reasonable time, must prevail in the present case.

ROLFE, B.—If a Judge were to make an order setting aside a verdict at *nisi prius*, it would probably be set aside as contrary to the practice of the Courts; but it would not be a nullity. A verdict before the sheriff is on the same footing. The application is too late to set aside the order for irregularity.

PER CURIAM.

Rule discharged.



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ESDAILE, P. O., v. TRUSTWELL.

L. C. 1444. 371.

DECLARATION in scire facias on a judgment obtained by the public officer of the London and Westminster Bank against the public officer of the Leeds and West Riding Bank. The declaration stated, that "the defendant, at the time of such judgment being recovered as aforesaid, was, and from thence hitherto hath been and still is, a member of the said co-partnership."

Declaration in scire facias on a judgment recovered against the public officer of a banking company, stated that the defendant, "at the time of such judgment was, and from thence hitherto hath been, and still is, a member of the said co-partnership:" *Semble*, that it is bad on special demurrer.

Special demurrer, pointing out for causes, that the declaration shews that the defendant was a member of the said Leeds and West Riding Bank at the time of the recovering the said judgment, and also at the time of the issuing and suing out of the said writ in the declaration mentioned; and that the said declaration is on that account double or at all events uncertain.

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T. Jones, in support of the demurrer. The plaintiff would recover upon this declaration if he shewed either that the defendant was a member at the time when the scire facias issued, or at the time when judgment was signed. By the act of Parliament under which these proceedings are had, these two liabilities are made distinct. The 7 Geo. 4, c. 46, s. 13, provides, that execution on any judgment against the public officer may issue against the shareholders for the time being, and in case such execution prove ineffectual, execution is to issue against those who were shareholders when the judgment was recovered. By the term "execution," a scire facias is to be understood. The plaintiff may, therefore, recover from the defendant, either by shewing him to be a shareholder now, or by shewing him to have been one at the date of the judgment. But he cannot rely upon both liabilities in one and the same declaration. Here, both liabilities are shewn, and

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the declaration is, therefore, bad for duplicity, or at all events for uncertainty, as it is impossible to say upon which of them the plaintiff relies. Although there is only one cause of action, yet, if it is attempted to support that in two different ways, it is clearly bad. It is not an answer to say that the demand is only one; if the declaration shews different matters by any of which the one demand is supported, it is bad for duplicity; *Stephen on Pleading*, 279, 4th edition. But even if the declaration is not double, it is at least uncertain. Under which part of the statute is the defendant sought to be charged? Is it as a shareholder when judgment was signed, or as a shareholder at the time of issuing the scire facias. [*Parke*, B.—There was a case of this sort before me at Chambers.] [*Willes*, amicus curiæ, stated that he was one of the counsel in that case, and that the learned Baron had ultimately quashed the writ because it gave the plaintiff two chances of success.] That is precisely the objection to this declaration. It shews two states of facts, on either of which the defendant is liable, and it is impossible to say on which of them the plaintiff intends to rely. [*Alderson*, B.—The next thing will be to aver, that he was a shareholder at the date of the contract made, of the judgment recovered, and of the scire facias issued.] If this declaration is good, there could be no objection to one in that form.

Bovill, contra. The declaration is neither double nor uncertain. It is clear that the defendant cannot be intended to be charged as a shareholder at the time of the judgment; because, to make him liable on that ground, it must appear that executions have issued against the present members and proved ineffectual. That ought to appear on the face of the declaration, and it would be a traversable averment. [*Parke*, B.—Is it necessary to aver that all due means have been taken to have execution against the shareholders? If such an allegation is necessary, it must

be traversable, and if so, you would take the opinion of the jury on a question which seems to have been intended to be decided by the Court.] It can hardly be said that the Court is to determine these matters conclusively at the time of issuing the writ (a).

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PARKE, B.—There appears to be considerable doubt about the question, and you had perhaps better amend, by striking out the averment that the defendant was a member at the time of the judgment recovered. The question is, whether the previous steps are to be a condition precedent found by the jury, or whether they are not finally decided by the Court by issuing the writ. We do not mean to say you are wrong, but there is considerable doubt about it. You had better therefore amend; and in doing so, you may amend the writ as well as the declaration.

Leave to amend accordingly.

(a) See *Field v. M'Kensie*, ante, p. 172.

FRYER v. ANDREWS.

SC. 1. Probk. 471.

ASSUMPSIT. The declaration contained two counts on promissory notes, and one on an account stated. The defendant appeared by attorney. Upon the declaration being delivered, she obtained an order to plead several matters, that is to say, her coverture in bar, and the Statute

The defendant, after appearing by attorney, obtained an order to plead together, her coverture in bar and the Statute of Limitations.

She pleaded those pleas accordingly. They were afterwards set aside by a Judge at Chambers, on the ground that they ought not to have been pleaded together, as coverture ought not to be pleaded after appearance by attorney. The defendant then, without any fresh appearance or order to plead several matters, delivered pleas of coverture to the two first counts, and the Statute of Limitations to the whole declaration. The plaintiff thereupon signed judgment for want of a plea. That judgment having been set aside by Judge's order, with costs, *Held*, upon application to rescind that order, that the judgment was improperly signed, as the order to plead several matters did not bind the defendant to plead each plea to the whole declaration, and the order setting aside the former pleas did not make a new rule to plead several matters necessary.

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of Limitations. Those pleas were accordingly pleaded to the declaration generally. An order was afterwards made to set aside the pleas, on the ground that they ought not to have been pleaded together, as coverture could not be pleaded after an appearance by attorney. The order gave the defendant two days' time to plead. The defendant then pleaded, without any fresh appearance or order to plead several matters, her coverture in bar to the two first counts only, and the Statute of Limitations to the whole declaration. The plaintiff then signed judgment for want of a plea, which judgment was set aside with costs, by an order of *Platt, B.*

Unthank now moved for a rule, calling on the defendant to shew cause why this order of *Platt, B.*, should not be rescinded, and why the rule to plead several matters should not be set aside. The judgment was properly signed. The pleas are not pleaded in pursuance of the order, which applies both pleas to the whole declaration, whereas one of them is pleaded only to two out of three counts. Secondly, the Judge setting aside the former pleas, upon the ground that they ought not to have been pleaded together, was in substance setting aside the rule to plead several matters. That rule was itself an improper one, because a married woman ought not to appear by attorney, and then be permitted to plead her coverture in bar. [*Parke, B.*—It may be true that she was a feme covert when the causes of action accrued, but discoverd, and, therefore, entitled to plead by attorney at the time of action brought.] At all events, the setting aside the pleas made a new order to plead several matters necessary.

POLLOCK, C. B.—The order to plead several matters is general. It does not tie the defendant to plead each plea to every part of the declaration. It is quite sufficient to warrant them as the defendant has pleaded them. The

pleas were set aside by an order which did not affect the rule to plead several matters. That rule remained untouched, and the defendant had a perfect right to avail herself of it. The judgment signed by the plaintiff was therefore irregular, and the order to set it aside properly made.

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PER CURIAM.

Rule refused.

PEGLER and Another v. HISLOP.

S.C. 1. 24th. 1847.

THIS was a rule calling upon the plaintiffs to shew cause why an order of a learned Judge at Chambers, made on the 25th of October, 1847, for the arrest of the defendant, under the 1 & 2 Vict. c. 110, s. 3, should not be rescinded, and all subsequent proceedings thereon be set aside; and why the bail bond given to the sheriff should not be delivered up to be cancelled.

On an application to the Court to rescind a Judge's order for arrest under 1 & 2 Vict. c. 110, s. 3, it is competent to the defendant to dispute, upon affidavit, the existence of a cause of action.

1. Pa. & R. 653.

It appeared that the order in question had been made upon an affidavit by one of the plaintiffs, of a debt due from the defendant to the plaintiffs, and of the intention of the defendant to leave the country in a Portuguese steamer called the Falcon, as soon as certain repairs to her machinery were completed. The present rule had been obtained upon an affidavit denying the existence of the debt; and also shewing that the defendant was master and supercargo of the Falcon, which traded regularly between this country and Portugal, arriving here every month, and remaining about ten days; that her repairs would detain her in this country for two months longer, and that he had no intention of quitting this country till after that time, and then only as captain and supercargo of the said vessel.

Martin and Ball shewed cause. The defendant cannot

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now try upon affidavit whether the plaintiffs have a good cause of action against him or not. He must confine himself therefore to the answer that he is not about to quit the country. The case of *Brackenbury v. Needham* (a) shews, that under the old law, where a defendant had been arrested on mesne process, the Court would not enter into the merits of the action. [*Alderson, B.*—It surely is competent for us to inquire whether there is any reasonable ground for the action. If we see that there is, of course we would not try the matter on affidavit.] If it be competent to the defendant to deny the debt, very long affidavits will be used, and the Court engaged in intricate questions of fact.

PARKE, B.—The practice as to arrest on mesne process was regulated by the 12 Geo. 1, c. 29, and the only condition imposed upon the plaintiff's right to arrest the defendant was, that he should make affidavit of the cause of action. That affidavit, therefore, could not be contradicted by a counter affidavit. But the 1 & 2 Vict. c. 110, s. 3, only permits the plaintiff to arrest the defendant on his shewing "to the satisfaction of a Judge," &c., "that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards," &c.; "and that there is probable cause for believing that the defendant," &c., is "about to quit England," &c. And the sixth section gives a power of appeal from the decision of the Judge to the Court who may vary or discharge his order. The language of this statute, therefore, leaves the matter at large, so that the defendant is not precluded from disputing, upon an application like the present, either the cause of action or any other facts stated in the plaintiffs' affidavits. Where the Statute of Limitations has been a bar to the debt, I have myself relieved parties at Chambers.

(a) 1 Dowl. 439.

Of course, it must be very clear that the plaintiff has no cause of action, for the Court to interfere.

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The whole case was gone into.

Pashley was heard in support of the rule.

PER CURIAM (*a*).—The arrest is premature. The order and *capias* may stand, but the rule will be absolute to deliver up the bail bond to be cancelled, the defendant's costs to be costs in the cause.

Rule accordingly.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Rolfe*, B.

COURT OF QUEEN'S BENCH.

Michaelmas Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

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WATKINS and Others v. TARPLEY, Clerk.

A writ of sequestration on a judgment debt, at the suit of the plaintiffs, had issued in April, 1834, upon which the bishop had granted his warrant of sequestration. On the 1st of October, 1838, the 1 & 2 Vict. c. 110, s. 17, took effect. In December, 1839, and in September, 1840, other writs of sequestration at the suit of other parties were sued out, and were in the hands of the bishop to execute: *Held*, that this Court would not order the bishop to hand over the first mentioned writ in order that the plaintiffs might indorse it, to levy the interest as well as the debt.

THIS was a rule calling upon the Bishop of Peterborough to shew cause why he should not make a return of what he had levied under the writ of sequestrari facias in this action, and what he claimed to deduct for the costs and charges attending the levy. The rule also called upon the Bishop of Peterborough and the defendant to shew cause why the said writ of sequestrari facias should not be handed to the plaintiffs or their attorney, in order that the claim for interest upon the said judgment since the 1st of October, 1838, might be indorsed thereon.

Upon the facts as stated in the affidavit of the plaintiffs' attorney in support of the rule, it appeared that the plaintiffs having recovered a verdict in the above action against the defendant, at the Northamptonshire Lent Assizes, 1834, for the sum of 4000*l.* with costs, afterwards issued a writ of fieri facias to levy 2270*l.*, being the actual amount of the debt and costs then due to the plaintiffs, to which the sheriff

Held, that this Court would not order the bishop to hand over the first mentioned writ in order that the plaintiffs might indorse it, to levy the interest as well as the debt.

of Northamptonshire made a return of nulla bona. That on the 8th of April, 1834, a writ of sequestrari facias was issued and delivered to the Bishop of Peterborough, in whose diocese the vicarage of Floore, of which the defendant was vicar, was situated. That a Mr. Scriven was appointed sequestrator by the bishop, and was still in the receipt of the rents and profits of the said vicarage. That Scriven had received large sums of money under the writ, a portion of which had been paid over to the plaintiffs in part liquidation of their debt and costs. That it was believed that the sequestrator had still in his hands, realized under and by virtue of the writ of sequestration, a large sum of money on account of the debt and costs in this action. That the plaintiffs claim to be entitled to interest upon the said sum of 2270*l.*, by virtue of the stat. 1 & 2 Vict. c. 110. That there is still due to the plaintiffs a large sum, as balance of the debt and for interest, which the sequestrator refuses to pay, alleging that the plaintiffs are not entitled to interest. That on the 11th of November instant, application was made to the Bishop of Peterborough through his secretary, to allow the writ of sequestrari facias to be sent to the plaintiffs' attorney, for the purpose of getting the interest then due and to become due upon the said judgment debt marked upon the back thereof, by the proper officer of this honourable Court; in reply to which the said secretary on behalf of the said bishop had refused to do so, alleging as his reason for such refusal that there were four other writs of sequestration then in the office against the said living.

The affidavit of the secretary of the bishop in answer stated that the writ of sequestrari facias in this action was issued on the 8th of April, 1834, and that on the 12th of April, 1834, the then Bishop of Peterborough issued his warrant of sequestration. That the said sum of 2270*l.* 6*s.* had not been levied. That on the 2nd of December, 1839, a further sequestration was issued, upon a writ directed to the Bishop of Peterborough, at the suit of the above named plaintiffs, authorizing Scriven to levy the further sum of 1140*l.* 7*s.* 6*d.* ;

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and on the same day a further sequestration at the suit of one E. S. Barton for 614*l.* 10*s.*; and on the 28th of December, 1839, a further sequestration at the suit of one R. Burgh for 184*l.* 10*s.* 3*d.*; and on the 5th of September, 1840, another sequestration at the suit of one T. Marriott for 179*l.* 5*s.*: and that the several sequestrations remain in force.

Bovill shewed cause, on behalf of the Bishop of Peterborough. As to the first part of the rule, there can be no objection on the part of the bishop to make the return sought to be obtained. But as to the latter part, it is submitted that the bishop ought not to be called upon to take a step by which he may be subjected to very serious litigation. The object of this rule, it appears, is to enable the plaintiffs to recover interest upon the debt, being a judgment debt, by virtue of the 1 & 2 Vict. c. 110, s. 17. That section enacts, "that every judgment debt shall carry interest at the rate of four per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." The proper course for the plaintiffs to have pursued was, as soon as the act was passed, to have called on the bishop to return the present writ of sequestration, and to have issued a fresh writ of sequestration for the residue of the debt and the interest. They have, however, neglected to do so, and if they are still entitled to interest under this section, they should issue a new writ of sequestration for the amount, which the words of the section would seem to warrant, and which the bishop could of course obey in the regular manner. This is merely an attempt to gain a priority of execution for the amount of the interest over the other writs of sequestration which are in the bishop's hands. Supposing the plaintiffs were to have the writ handed over to them, and were to make the indorsement proposed, from what time is that

indorsement to date? If from the time when the writ of sequestration originally issued, then it would authorize the levying for interest at a time prior to the passing of the statute, and when such an indorsement would consequently be illegal. If from the present time, then it would be requiring the bishop virtually to suspend the execution of the writs now in his hands, in favour of a subsequent claim. This rule should have called on those creditors who have subsequent writs of sequestration in the bishop's hands to shew cause; and the Court will not make absolute a rule like the present, affecting the rights of third parties who have had no notice of the application. There are, besides, technical defects in this application. It does not call on the Bishop of Peterborough to amend the warrant of sequestration already issued by his predecessor; and, if not, how can he issue a second warrant on the same writ? Nor does the rule properly specify, there being two writs of sequestration at the suit of the plaintiffs in the bishop's hands against the defendant, which writ it is, which is required to be handed over.

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Aspinall also shewed cause on behalf of the defendant.

Phipson, in support of the rule. No doubt the bishop cannot levy for the interest, unless it is indorsed on the writ of sequestration; but when once that is done, it will be a sufficient protection to the bishop that he has obeyed the tenor of the writ. The 1 & 2 Vict. c. 110, s. 17, clearly entitles the plaintiffs to interest from the date of the commencement of that act, 1st of October, 1838; and the only question is, by what mode they are to obtain it? It cannot be by a fresh writ; for then there would be one writ for the debt, and another for the interest, running at the same time, which would be wholly without precedent. The only mode, therefore, is by the Court authorizing the plaintiffs to indorse on the writ the amount of interest to which they have become entitled under the act. If any

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hardship is inflicted on other parties whose claims will thus be interfered with, the Legislature alone is responsible, which confers this right upon the possessor of a judgment, and which enacts that such interest "may be levied under a writ of execution on such judgment." If this had been the case of a writ of execution issued after the passing of the act, and the plaintiffs had omitted to indorse this claim for interest on the writ, the Court might perhaps refuse to assist them in recovering it afterwards. But here there has been no default on their part in not making the indorsement when the writ issued, as they had no right at that time to make it; and now that the statute gives it them, there must be some mode of obtaining it. If this order were made, and the interest indorsed on the writ of sequestration, there would be no difficulty, it is apprehended, in the bishop amending his warrant by it, or even issuing a fresh one. If the full amount at present indorsed on the writ had been levied, perhaps some difficulty might occur in granting this motion; but it appears that that is not the case.

ERLE, J.—There seems to be no objection to the first part of this rule, which requires the bishop to return how much he has levied under the writ of sequestration in this action; and therefore, as to that part, the rule will be absolute.

But as to the other part, which calls upon the Bishop of Peterborough to hand over to the plaintiffs the writ itself, in order that the plaintiffs may indorse on it their claim for interest under the 1 & 2 Vict. c. 110, s. 17, I think the rule must be discharged. It appears to me, that if I were to grant this application, I should really in effect be granting a new writ of sequestrari facias, with an order that it should take effect before certain other writs of sequestration which are already in the hands of the bishop; and it would be directly contrary to the principle that a subsequent writ of sequestration takes effect upon the property of the debtor

from the time when it is delivered to the bishop, subject only to the claim on the previous writ.

I feel less scruple in refusing this application, because at the time when the 1 & 2 Vict. c. 110, came into force, the plaintiffs might have applied for permission to make this indorsement before the subsequent writs had issued, and then the rights of third parties would not have been interfered with. Instead of doing so, they wait till now to make the application, when other writs have been issued and other rights created under them. I think, therefore, that I ought not to interfere in the manner sought for, but leave the plaintiffs to the remedy, if any, which they may be advised they have, for the recovery of the interest.

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Rule accordingly.

JACKSON v. OATES.

IN an action on the case for malicious prosecution, the second count was for indicting, without probable cause, the plaintiff for larceny, of which indictment he was acquitted at the Durham Quarter Sessions. The count, after setting forth the indictment and acquittal, contained the usual averment "as by the record and proceedings thereof remaining in the said Court of Quarter Sessions, reference being thereunto had, will more fully appear."

It is necessary, in order to try the issue joined on a plea of nul tiel record, that the issue roll should be made up and carried in, notwithstanding the Reg. Gen., H. T., 4 Wm. 4, pt. II. r. 15.

To this count the defendant pleaded, among other pleas, nul tiel record, upon which issue was joined.

On a former day in this Term, a rule had been obtained for a certiorari to the justices of the county of Durham, to certify the tenor of the record, and that writ, with the record annexed, having been duly returned and in Court, the above issue came on to-day to be tried. It appeared that the issue roll had not been made up and carried in.

Heath, for the plaintiff, moved that the above issue be

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found for the plaintiff. To-day being the day the plaintiff has given himself to produce the record, it is necessary to bring the trial on (a). Should the Court, however, be of opinion that the issue roll must first be made up and carried in, the plaintiff will move for an adjournment of the trial. It is submitted, however, that the Reg. Gen., Hil. Term, 4 Wm. 4, pt. II. r. 15, renders the issue roll unnecessary and improper. That rule says, "the entry of proceedings on the record for trial, or on the judgment roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever." Since this rule, the making up the issue roll was held unnecessary previous to the trial of issues of fact (b); neither is it ever now done previous to the trial of issues of law, *i. e.*, arguing demurrers, although formerly necessary. The general opinion of the profession seems to be, that in the present instance the issue roll need not be made up.

PATTESON, J.—The Master informs me that the usual course is, upon an issue on a plea of nul tiel record, that the issue roll should be made up and carried in. Is it not better to adhere to the practice which has always been pursued?

Heath. There may be a good reason in favour of the practice (c). The plaintiff is only desirous not to incur needless expense, particularly if the rule just cited is to prevent him from being allowed the same on taxation. But as there is no fear, after this expression of the opinion

(a) *Caloeraq v. Pinkero*, Barnes, 343.

✓ (b) *Hopkins v. Francis*, *ante*, vol. 2, p. 664; S. C. 13 M. & W. 668.

(c) The Master said the prac-

tice was for him to enter on the margin of the roll how the issue joined on this plea was found, and that the judgment was ultimately signed in conformity with that entry.

of the Court, that the costs of making up the roll will be disallowed him if he succeeds on this issue, the plaintiff will at once move that the trial be adjourned to a subsequent day in the present Term, in order that the roll may be, in the meantime, made up.

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Pearson for the defendant.

Subsequently, on the day named, the issue roll having been duly made up and carried in, the above issue was found for the plaintiff, and an entry of such finding made on the issue roll accordingly.

—◆—
In re PRESTON.

A WRIT of habeas corpus had been obtained at the instance of James Wilson, calling upon James Hutchons to produce the body of Edmund Benjamin George Teil Preston, being detained in his custody, together with the cause, &c.

The following were the facts of this case as they appeared upon the affidavits. Mrs. Templer, then Mrs. Preston, was left a widow, in India, in 1840, with two children, one of whom was the subject of the present application. She was left in rather straitened circumstances, and the mother of her deceased husband, who was a person of small independent fortune, residing in England, wrote to her shortly after her

A. was left a widow in India with two children. B., the mother of her deceased husband, offered to take charge of the children if they were sent home to her to England. One of them accordingly was sent home to the grand-mother, and resided with her till the time of her death in 1843.

She left her property to trustees in trust for the children. Since her death, the child had been put to school by the trustees, and was under their charge and control; with whose arrangements the mother had at various times expressed her satisfaction, and her sense of the kindness shewn to the child. In the early part of 1847, the mother, who had married again, and her second husband, executed a joint and several letter of attorney to C. to demand and receive the custody of the child on her behalf. C., after demand and refusal, brought a writ of habeas corpus. The Court refused, under the above circumstances, after the acquiescence by the mother in the custody of the trustees, and no cause of complaint being assigned for the change, to remove the child from their custody; or to examine the child with a view of ascertaining whether he were capable of exercising a sound discretion, and if so, of declaring him at liberty to go with whomever he wished.

Quære, whether a parent residing abroad can appoint an attorney to claim and receive, under a writ of habeas corpus, the custody of an infant child?

And *quære*, if a widow, having married again, can execute such a letter of attorney?

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husband's death, offering to take charge of the children, and to bring them up. On the 16th of April, 1841, Mrs. Templer wrote a letter in answer, thanking the grandmother in the warmest terms for the offer, but declining for the present to part with her children. Ultimately, however, the eldest boy, Edmund Preston, was sent over to the grandmother; and after staying with her some time in England, was taken over by her to Germany in June, 1843, and placed at school there with a Dr. Kraus, whose wife was an English woman. The grandmother returned to England, and shortly afterwards died, having made her will, by which she left her property to a Mr. Potts and a Mr. M'Naughten, as trustees for her grandchildren. She also appointed these gentlemen to be guardians of her grandchildren. By a codicil she revoked the appointment of Mr. M'Naughten as a trustee, &c., and named Mr. Hutchons in his place. She died on the 29th of December, 1843. Mr. Potts and Mr. Hutchons had since acted as trustees under her will. They had sent for the child home from Germany, and he was brought over by Dr. Kraus at the Midsummer Vacation, 1844. They then placed him at a school near to where Mr. Hutchons resided, but as his health was delicate, he was afterwards removed to a school at Hastings, where he continued till the present time. He was in the habit of spending the Christmas holidays at Mr. Hutchons' house; and whilst at school, some of Mr. Hutchons' friends who lived at Hastings used to go to see him; and he corresponded regularly with his mother. In 1845, Mrs. Templer married her present husband. From time to time, Mrs. Templer had written to Mr. Hutchons expressing her satisfaction at his arrangements respecting her son, and her gratitude for his kindness to him; and the last letter which had been received was dated July 29th, 1846.

In March, 1847, however, it appeared that she, together with her second husband, Mr. Templer, executed a joint and several letter of attorney at Calcutta.

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The letter of attorney recited the will of Mrs. Mary Ann Preston, and that Edmund Benjamin G. T. Preston, the grandchild therein named, was now in England, and now or lately under the care of S. Stirling, &c., with whom he was placed by the said R. Potts and James Hutchons, or one or either of them, or by their authority or the authority of one of them; and that a marriage had been had between Mary Templer (Mrs. Preston) and Edward Templer: "And whereas the said Edward Templer and Mary Templer are desirous of empowering the persons hereinafter named to receive and take charge of the said Edmund Benjamin G. T. Preston, and otherwise to act for them in the premises hereinafter mentioned:" And witnessed that they jointly and severally appointed H. Remfry and Robert Wilson to be their attorneys jointly and severally, and in each or either of their name or names, or in the names of them the said H. R. and R. W., or in the name of either of them, "to apply to the said S. Stirling and Richard Henry Potts and James Hutchons, and each or either of them, and to all other person and persons whomsoever, with whom or in whose care, custody, power or control the said Edmund Preston now is or hereafter shall or may be placed for the time being, for delivering up the said Edmund Preston to them the said H. R. and R. W., or either of them, &c., to such person or persons as they or either of them may appoint to receive the said Edmund Preston, and to receive and take possession, or authorize and empower another or others to receive and take possession of the said Edmund Preston." And to apply to the said R. Potts and J. Hutchons "for all sum and sums of money, goods, chattels, estate and effects, which now is or are, or hereafter shall or may be due and owing, and payable, or belonging to, for, or on account of them the said E. Templer and M. Templer, or either of them," under the will of Mrs. Mary Ann Preston, for maintenance and education of the grandchildren. And to demand and have an inventory and account of the estate and effects left by Mary Ann Preston, and to examine and investigate such

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accounts. And to ask and demand the production for examination of all securities, stocks, &c., and to give receipts for the same, and sign and seal discharges for the same. "And in case of the nondelivery of the said Edmund Preston, or the nondelivery or nonpayment," &c.; "for them the said Edward Templer and Mary Templer, and each or either of them, or otherwise as may be necessary, to commence and prosecute any action or actions, suit or suits, in any Court or Courts of Law or Equity, or in any Ecclesiastical Court, or in or before any other Court or Courts, tribunal or tribunals whatsoever, to compel delivery up of the said Edmund Preston, and to compel delivery and payment respectively of any such inventory or inventories, account or accounts," &c. "And if thought necessary or expedient by the said H. R. and R. W., or either of them, to take all necessary steps, and to do all necessary acts and deeds, and to make all necessary applications for making the said Edmund Preston and W. T. Preston, or either of them, wards in the Court of Chancery in England, and for bringing them, or either of them, and the property to which they may now or hereafter be entitled, under the said in part recited last will and testament, and codicil, under the protection and control, or otherwise, of the said Court of Chancery, or other Court or Courts, person or persons in England." And all such actions or suits respectively to follow and prosecute, or to abandon and discontinue, &c., "and to adopt and use lawful ways and means whatsoever," in carrying out the objects aforesaid. And to appear to any action or suit against the said E. Templer and M. Templer, and take all necessary steps for defending the same. And to make and deliver in their names all deeds necessary, or that may be proper and advisable for them to enter into for the purposes aforesaid. And, if necessary, to nominate an attorney in their place to perform these powers. "And generally to do and perform all and every such further and other acts, matters, and things whatsoever, for the better and more fully and effectually executing and discharging the several powers

and authorities hereby given," &c., as to them shall seem meet. And in case of the decease of Edward Templer and Mary Templer, or either of them, the acts done after their death under this letter of attorney to be as effectual and binding on their heirs, executors and administrators, as the same would have been upon themselves if living, unless notice of their decease should have been previously given. And they covenanted to ratify all that might be done under this letter of attorney.

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Under the authority of this letter of attorney, a demand of possession of the child had been made, and upon refusal, the present writ of habeas corpus had been obtained. No grounds of dissatisfaction with the conduct of Mr. Hutchons were stated, nor was it suggested that the education which the child, who was nine years of age, was receiving, was in any respect deficient or improper. It appeared that Mrs. Templer had expressed some dissatisfaction at the sum which the trustees allowed her for the support of the other child. It was alleged in the affidavits in answer, that the supposed object of this application was to place the child under the guardianship of a Mrs. Allen, a relation of the mother's, who was described as a person living by letting lodgings, and in a very humble rank of life, and not a fit person to whose care a child of that age should be entrusted.

The writ of habeas corpus being now returnable, and the child being brought up (a),

Bramoell moved that he should be delivered into the hands of Mr. Wilson, who was authorized by his mother to receive him under the letter of attorney.

Bovill, on behalf of Mr. Hutchons, shewed cause. This is a perfectly novel application, and, without some precedent, the Court will not be disposed to grant it. It is submitted,

(a) The child was not brought into Court, but was in waiting in an adjoining apartment.

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first, that a letter of attorney cannot confer a right to the custody of the child, with which the Court will only interfere upon the personal application of the parent; and that the argument of inconvenience, which might arise if a letter of attorney were not in some cases allowed, does not arise here, as the child is not restrained in Mr. Hutchons' custody. Secondly, that even if it could, Mrs. Templer, being a feme covert, had no power to execute a letter of attorney, which must be considered in point of law, and would require to be pleaded, as the deed of the husband alone. And thirdly, that even if the Court should be of a different opinion on these two points, the utmost that the Court would do, would be to examine the child to see if he were capable of using a discretion; and, if so, would leave him at liberty to go with whomsoever he chose. The rule is so laid down in *Rex v. Greenhill* (a). That was a question whether the father, against whom immoral conduct was alleged, or the mother, was entitled to the custody of the children, who were infants, the eldest of whom was five years and a half old. There Lord *Denman*, in delivering judgment, says:—"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody." So Mr. Justice *Littledale* says—"The practice in such cases is that, if the children be of a proper age, the Court gives them their election as to the custody in which they will be; if not, the Court takes care that they be delivered into the proper custody." To the same effect Mr. Justice *Williams* expressed himself. And Mr. Justice *Coleridge* says:—"A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and

✓ (a) 4 A. & E. 624; S. C. 6 N. & M. 244.

disposes of many cases, namely, that the individual who has been under the restraint is declared at liberty; and the Court will even direct that the party shall be attended home by an officer, to make the order effectual. But, where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists." In conformity with the principles laid down in this case was the decision of the Court of Common Pleas, in *Re Ann Lloyd (a)*. There the mother of an illegitimate female child of between eleven and twelve years of age, obtained an habeas corpus, directed to the putative father, to bring her up before the Court. The father produced the child in obedience to the writ, leaving the Court to deal with her as they might think proper; and the Court declared that she might use her own discretion as to where she would go, and the child being unwilling to go with her mother, the Court would not permit the mother to take her by force. In the present case, it is submitted, the Court will pursue a similar course. The child is produced by Mr. Hutchons in obedience to the writ. He has no wish to retain the child under his charge except to fulfil his duty as trustee, and his promise to the grandmother, to take care of the child. The child is nine years of age, and intelligent and well educated for his age; and the Court will judge, upon examining him, whether he is not old enough to choose for himself, and capable of using his own discretion as to with whom he will go. Another answer to this application is that the object of it is not to set the child at liberty, if indeed he were under restraint; but to order him to be delivered into proper custody. There is no one who can receive him in such custody, which must be a free custody. The father is dead, and the mother abroad; and, therefore, there is no one before the Court, who is capable of receiving him into free custody.

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Bramwell, in support of the motion. It is submitted, that although no precedent may exist of an application like the present, yet that its novelty will not induce the Court to refuse it, if they can see that it is founded on reason and justice, and that manifest inconvenience might arise, where a parent was residing abroad, if his children were taken against his will out of the custody of those persons in whose charge he had left them in this country, or if he wished to have the children sent abroad to him, and the person, in whose charge they were left, refused to give them up. It cannot be necessary that a parent should appear personally on the floor of the Court to demand the custody of an infant child; and if his appearance by his attorney or agent is sufficient, where he resides in this country, his attorney, properly constituted, appearing for him where he happens to be abroad, would, *pari ratione*, seem to be sufficient. Then the question arises, is the mother, in the present case, the person properly entitled to the custody of the child; and it is submitted that she is. In *Com. Dig.* tit. "*Guardian*," (D), it is said, "the father and mother of an infant, who is not an heir apparent, shall be guardian to him, till his age of fourteen years, by reason of nurture."—"But a stranger to the infant cannot be his guardian by reason of nurture."—"Guardian by reason of nurture is for the education or governance of an infant, who has no other guardian, till his age of discretion." From *Co. Litt.* 84 b, and 88 b (a), as well as from the above passages, it may be gathered, that where the father is dead, the mother has the same right to the custody of the child as the father possessed. It is said, however, that being a married woman, Mrs. Templer cannot appoint an attorney; but if she is entitled to the guardianship of the child, and a parent residing abroad may depute an agent to receive the child on his or her behalf, there must be some means of so doing.

(a) See also edition by Hargreave, 88 b, note 67; 2 Steph. Comm. 338.

The Court will see that, taken merely as a consent to the appointment of a person named by her husband, Mrs. Templer has sufficiently appointed a person into whose charge the Court may cause the child to be delivered. As to what has been urged as to the course the Court should take upon the present occasion, namely, to examine the child, and, if found of reason enough to use its own discretion, that the Court should then declare the child at liberty to go where it will; it is submitted, that where the law has pointed out what is the proper custody for a child until of fourteen years of age, it would be highly inconvenient if the Court were to leave a discretion in the child, which would render the right to the legal custody nugatory. In the present case, as in most others, it would be a mere mockery to ask the child whether he would sooner remain with those to whom he is accustomed, or go amongst strangers. In *Rex v. Johnson (a)*, a female child of nine years of age was brought up by habeas corpus in the custody of her nurse, and it was moved that she might be discharged if she was under any restraint, which was agreed to, but it appeared she was not. Then it was moved, upon producing her father's will devising the custody of her to an uncle, that she might be delivered up to him as her guardian. The Court at first doubted, says the report, whether they should go any further than to see she was under no illegal restraint; and they took time to consider till the next day. Then, however, they declared that this being the case of a young child, who had no judgment of her own, they ought to deliver her to her guardian, who accordingly took possession of her in Court. In *Ex parte M'Clellan (b)*, which was an application to remove a child who had been brought up on habeas corpus, at the instance of the father, from the custody of the mother to

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✓ (a) 1 Stra. 579; S. C. 2 Ld. above case was overruled.
Raym. 1334. See, however, *Rex* ✓ (b) 1 Dowl. 81.
v. Smith, 2 Stra. 982, where the

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that of the father, it was urged that the child not being under any restraint, the Court would not interfere, but declare it at liberty to go where it pleased; and the case of *Rex v. Middleton (a)* was cited, where a husband claimed the custody of his wife, and the Court refused to interfere. But Mr. Justice *Patteson* held that the father was entitled to the custody of the child, nothing being shewn to prove that his custody was improper; and referring to the case cited, said, "The husband has not such a right to the custody of his wife's person, as the father has to that of his child. A wife may exercise some judgment and discretion, but a child cannot." It also appears from that case that the child was delivered up to the custody of an agent appointed by the father. [*Patteson, J.*—No point was there made as to the father not claiming the child in person.] As to the case of *In re Lloyd (b)* which has been relied on by the other side, there were peculiar circumstances in that case. The Court seems to have been much influenced in their decision by the circumstance that the child was illegitimate, and, therefore, that no one was entitled to the custody; but it is apprehended that that is not so, and that the parents of an illegitimate child are its guardians by nature, according to the view alluded to by Mr. *Hargreave* in a note to *Co. Litt.* 88 b, note (66). [*Patteson, J.*—Is there any proceeding pending to make the children wards of Chancery?] That does not appear; but even if a bill were filed for that purpose, the Court would not delay enforcing the habeas corpus, unless a speedy decision in Chancery was to be expected; *Rex v. Isley (c)*. He also referred to *Lyons v. Blenkin (d)*, and *M'Pherson on Infants*, pp. 135—141, where all the cases on the subject are collected.

Cur. adv. vult.

(a) 1 Chit. Rep. 654.

✓(b) 3 M. & G. 547; S. C. 4
Scott, N. R. 200.

✓(c) 5 A. & E. 441; S. C. 6 N.
& M. 730.

(d) Jac. 245.

PATTESON, J.—This was an application on the part of a Mr. and Mrs. Templer, who are residing in India, to have a child of the latter by a former husband, delivered into the custody of a party whom they have empowered to demand it by letter of attorney. The child is a male child, and aged nine years.

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I was much struck at first with the novelty of the application; a person residing out of the jurisdiction of the Court applying for this purpose by an agent appointed by letter of attorney: nor was I able to recollect any case, nor was any cited, in which a similar application had been made to this Court.

But the case does not turn on the mere novelty of the application, for there are some very peculiar circumstances connected with it.

It appears that, about the year 1840, Mrs. Templer, then Mrs. Preston, was left a widow in India, with two children, in rather straitened circumstances. That her deceased husband's mother, Mrs. Mary Ann Preston, was a person possessed of a small fortune in this country, and that she wrote and offered to take charge of and to bring up the children. Mrs. Templer, in answer, thanked her for her kindness, but did not accept the offer at the time. Ultimately, however, the eldest boy, the subject of the present application, was sent home to his grandmother. He lived with her some time in England, and when she went over afterwards to Germany, was taken by her there, and placed at a school, kept by a Dr. Kraus, the wife of that gentleman being an English woman. Soon after she returned to England and died here, leaving a will, whereby she appointed a Mr. Potts and a Mr. M'Naughten her trustees, and left her property to them, in trust for her two grandchildren. She also appointed them by the same will, to be the guardians of these children. This of course she had no power to do. By a codicil she revoked the appointment of Mr. M'Naughten as one of her trustees, and appointed Mr. Hutchons instead. Mr. Potts and Mr.

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Hutchons both proved the will; but the former gentleman seems to have interfered very little with respect to this child, and to have left the management entirely to Mr. Hutchons. The child was subsequently brought over from Germany and placed at a school at Hastings by Mr. Hutchons, where he has remained ever since, with the exception of occasional visits at the holidays to Mr. Hutchons.

Now, from the time of the grandmother's death, we find Mrs. Templer writing to Mr. Hutchons and Mr. Pott thanking them for their care of the child, and expressing the highest satisfaction at their conduct, and uniformly acquiescing in their guardianship and control over it.

It appears, however, that after some time she was dissatisfied with the allowance made to her by the trustees for the support of the other child; for she makes no complaint against Mr. Hutchons. On a sudden, comes over this letter of attorney to demand possession of the child; and not only for that purpose, but in the most general terms, to apply for "all sums of money, goods, chattels, estate and effects which now is or are, or hereafter shall or may be due and owing and payable or belonging to, for, or on account of them, the said Edward Templer, by virtue of the said Mary Templer, or on account of the said E. B. G. T. Preston and Wm. Preston, or either of them," under the will of the grandmother; and to demand and receive accounts of the estate, effects, &c. of the grandmother; and if thought necessary, to make application to have the children made wards of Chancery. I do not know whether any step has been taken with the latter view, but it is not material for the decision of the present question.

It does not seem to be at all clear what is the motive that has actuated Mrs. Templer in thus interposing; but I am inclined to think that it must be in some way connected with money. I do not therefore believe that I have been made acquainted with the true facts of the case. It is said that it is the object of this application to place the child in the hands of a Mrs. Allen; and if what is stated upon the

affidavits be correct, it would appear that, from her station in life, and occupation, it would not be the most desirable thing for the child to be placed with her. There is no specific reasonable ground stated why Mrs. Templer should now wish to take the child out of the charge of these trustees, and place him in other hands.

I have not been able to find any instance in which such an application as the present has been made. I have looked into *M'Pherson on Infancy*, where the cases are collected, and do not find any case in which the parent residing abroad has sought, by his attorney, to obtain possession of his child, without appearing himself before the Court; and I very much doubt if the Court will allow it to be done. But I find a case, to which my attention was very properly called by Mr. *Bramwell*, in *Jacob's Reports* (a), which resembles very closely the facts of the present case. There "a grandmother provided for her granddaughters by the devise of lands and by pecuniary legacies, and entrusted to her daughter, the aunt of the infants, the management of their property, and the discretion of providing for their maintenance and education out of it, and also appointed her their guardian." Now there she had no right whatever to appoint a guardian, for the father was alive. "The father of the infants had committed them to the care of the testatrix, and she had defrayed the expenses of their education. After her death, they continued to reside in the same manner under the care of their aunt, by whom they were educated in the Baptist persuasion. Three years later, when they were of the ages of nineteen, fourteen, and twelve, respectively, the aunt married, and the father filed a bill in the name of the infants, as their next friend, against the aunt and her husband, for accounts of his daughters' fortunes, and insisting that they ought to be placed under his care, and that, not being of ability to maintain them, a

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(a) *Lyons v. Blenkin*, Jac. 245, cited by his Lordship from *M'Pherson's Law of Infants*, p. 138.

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proper sum should be allowed to him for that purpose. He was a Dissenting minister of slender means, formerly a Baptist; but for some years past a Unitarian. Lord *Eldon* not having chosen to decide the question upon habeas corpus, the father presented a petition for the restoration of the infants to him." That was the case of a father, present in England, and, therefore, the strongest possible; but Lord *Eldon* "considered that the father, by his consent, had enabled the guardian to act, and he refused to withdraw the children from the custody of their aunt." Now that is almost identical with the present case: for here money is left to the child by his grandmother; an appointment by her, so far as she could make it, of a guardian; that guardianship acquiesced in by the mother. And now, without any reason being given, she suddenly executes a letter of attorney to certain persons to withdraw the child from that guardianship.

There is another case also cited in the same work (a), where "an uncle took his three infant nieces into his house and maintained them. He left them, by his will, considerable legacies, which were to go over on marriage under twenty-one, without the consent of his executors. One of the executors, a cousin of the testator, inhabited the testator's house, and the nieces continued there. The father of the children petitioned that they might be delivered to him; the eldest of the infants, who was of the age of thirteen, appeared in Court, and denied that she was under any force. It appeared to have been the wish of the testator that the infants should remain. Lord *King* said, that the father was entitled to the custody of his own children during infancy, not only by nurture, but by nature; but he thought that he could not, in so summary a way as on a petition, and without a bill, deliver over the bodies of the infants to their father: the latter, he said, might take

(a) *M'Pherson's Law of Infants*, p. 139, citing *Ex parte Hopkins*, 3 P. Wms. 152. ✓

them, if he could, but not by force; and the executor who had them in his custody was directed to allow the parents free access to them at all reasonable times." That of course was previous to the case above referred to, and must have been before Lord *Eldon* when he decided it.

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It therefore appears to me that I ought not to take him from the care under which his mother has allowed him to remain so long, and as to which there is no suggestion of any want of kindness or attention on the part of those with whom he is, or any deficiency or impropriety in the education which he is receiving, or in the manner in which he is being brought up.

If the real cause of this application is founded on a dissatisfaction about money arrangements, recourse may be had to Chancery, to make the children wards of that Court, and that Court will then incidentally order respecting those matters.

In deciding this question, it seems to me it is altogether useless to question the child, as to with whom he might wish to be. It is difficult to say at what age a child is capable of exercising a sound discretion, and judging for itself in a matter of this kind; but it seems to me that it is but a mockery to ask a child of nine years of age, whether he would sooner remain with the person who has brought him up, or go with a stranger.

Motion refused.

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ELTON v. MARTINDALE.

(In the full Court.)

"H. B., clerk to the above named defendant," is not a sufficient description of a deponent in an affidavit.

MEYMOTT having, on a former day, obtained a rule nisi to set aside the declaration for irregularity, on the ground that no appearance had been entered,

Ball now shewed cause, and took an objection to the form of the affidavit on which the rule nisi had been obtained. The affidavit commenced as follows: "H. B., clerk to the above named defendant," maketh oath, &c. This, it was contended, was not a sufficient description of the deponent.

Meymott, in support of the rule, argued, that inasmuch as "A. B., clerk to C. D., of," &c. (giving C. D.'s address) is sufficient, without stating the deponent's residence, according to *Strike v. Blanchard* (a); and as an affidavit made by the defendant without giving his address is enough, according to *Brooks v. Farlar* (b); an affidavit made by the clerk to the defendant was sufficient.

PER CURIAM (c). There is no case which goes so far as the present. We think the affidavit insufficient.

Rule discharged, without costs. Defendant to have four days' time to plead, on the usual terms.

✓(a) 5 Dowl. 216.

✓(b) Ibid. 361; S. C. 3 Scott, 654; 3 Bing. N. C. 291.

(c) Lord Denman, C. J., Patterson, J., Coleridge, J., and Wightman, J.

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THE QUEEN, on the prosecution of Joseph Rogerson v.
THOMAS GRIMSHAW.

THIS was a rule calling upon the relator in this prosecution to shew cause why so much of the judgment entered in this prosecution as adjudged that the said relator should recover against the defendant his costs in this prosecution, should not be set aside; and why the taxation of such costs should not be stayed.

It appeared that in Easter Term, 1844, an information in the nature of a quo warranto, was filed against the defendant, at the instance of one Joseph Rogerson, for using and exercising the office of coroner of the borough of Wigan.

The information stated that the borough of Wigan is an ancient borough, and that the office of coroner of the said borough of Wigan on the 1st day of December, 1842, and long before, was and yet is, and during all the time aforesaid hath been, a public office, and an office of great trust and pre-eminence, touching the administration of justice in the said borough, that is to say, at the borough of Wigan aforesaid, in the county aforesaid, and that Thomas Grimshaw, on the day and year aforesaid did, and still doth, use and exercise the office without any legal warrant, royal grant, or right whatsoever.

The defendant pleaded that the borough of Wigan was a borough corporate, mentioned in schedule (A) of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76. That on the 23rd of January, 1836, the council of the borough petitioned his then Majesty, King William the Fourth, to grant a separate Court of Quarter Sessions to be holden for the borough. That on the 10th of June, 1836, his

Previous to the passing the 5 & 6 Wm. 4, c. 76, the mayor for the time being, of a borough corporate, named in schedule (A) of that act, held and exercised the office of coroner also for the borough. Subsequent to that act, the borough petitioned for and obtained a separate Court of Quarter Sessions, and appointed a coroner under the 62nd sect. of that act: *Held*, on motion to obtain the costs of an information in the nature of a quo warranto, brought to try the right to that office, that it was not an "office" within the meaning of 9 Anne, c. 20, s. 5, so as to entitle the relator to costs, on judgment for the crown.

An "office," to come within the meaning of the 9 Anne, c. 20, ss. 1, 4, and 5, must be a corporate office.

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Majesty duly granted a Court of Quarter Sessions, and afterwards, on the 9th of July, the grant was duly signified to the council of the said borough, and afterwards duly accepted by them. That after the said grant and acceptance on the 16th of November, 1842, the office of coroner being then vacant, a meeting of the said council duly convened was duly held and adjourned to the 30th of November, on which day the council duly elected Thomas Grimshaw to the office of coroner, and to be coroner of such borough. That the corporate seal was then affixed to the said appointment, by virtue whereof the said Thomas Grimshaw exercised, and still doth exercise, the said office of coroner for the said borough of Wigan. The plea concluded with a special traverse, that the said Thomas Grimshaw used or exercised the said office of coroner without legal warrant or right.

The plaintiff traversed: first, that the office of coroner was vacant.

Secondly. That the first meeting of council was duly convened or held.

Thirdly. That the meeting by adjournment was duly held.

Fourthly. That the council meeting did duly elect and appoint the said Thomas Grimshaw to the said office of coroner. Upon all these traverses issue was joined.

At the trial, which took place at the Summer Assizes, 1844, for Lancashire, the case was turned into a special verdict for the opinion of this Court. The special verdict found that the borough of Wigan was an ancient borough, and that at the time of the passing of the Municipal Corporation Act, it was a borough corporate, named and mentioned in schedule (A). That the mayor, aldermen, and burgesses of the said borough were and are a body corporate, by the name of the mayor, aldermen, and burgesses of the borough of Wigan. That before the Municipal Corporation Act, the mayor for the said borough for the

time being, held and exercised the office of coroner for the said borough. The petition and grant of a separate Court of Quarter Sessions was then found, as set forth in the plea. It then set forth the minutes of council by which Mr. Rogerson was appointed to the office of coroner, from which he was subsequently dismissed, and Mr. Grimshaw elected in his place; and prayed the direction of the Court upon the whole facts as to how the above issues should be found. The case came on for argument on the 5th of June, 1847, when the Court decided that Grimshaw was not duly elected, the office being full by the appointment of Rogerson, and ordered that judgment should be entered for the Queen on the first and fourth issues, and for the defendant on the second and third.

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When the parties went before the Master to tax the costs, it was contended by the relator that he was entitled to the costs of the prosecution under the statute 9 Anne, c. 20 (a).

The defendant, however, insisted that the relator was not entitled to the benefit of that statute; as the office of coroner, in respect of which this information was laid, was not a corporate office within the meaning of the statute of Anne.

The Master refused to tax the costs, but said that the parties had better go before a Judge at Chambers and obtain an order for that purpose. The parties accordingly attended before Mr. Baron *Platt* at Chambers, who, after hearing the question argued, and after having taken time to consider, referred the parties to the Court, and the present rule was then obtained.

Martin and *Pickering* shewed cause. This is a question upon the construction of the stat. 9 Anne, c. 20,

(a) *Row v. Downes*, 1 T. R. 453, succeeded on some of the issues, was referred to on the argument, as shewing that the relator, having was entitled to the costs of all the issues.

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ss. 1, 4, 5 (a), whether the office of coroner of the borough of Wigan, is an office within a town corporate or borough,

(a) The following are the material sections of 9 Anne, c. 20, adverted to in the argument.

Sect. 1. "Whereas divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves and other offices, within cities, towns corporate, boroughs, and places, within that part of Great Britain called England and Wales; and where such offices were annual offices, it hath been found very difficult, if not impracticable, by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and where such offices were not annual offices, it hath been found difficult to try and determine the right of such persons to such offices, before they have done divers acts in their said offices, prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs, and places, wherein they have respectively acted: And whereas divers persons, who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs, or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted, or restored to

their said offices or franchises of being burgesses or freemen, than by writs of mandamus, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented.' For remedy whereof, be it enacted, that from and after the first day of Trinity Term, in the year of our Lord one thousand seven hundred and eleven, where any writ of mandamus shall issue out of the Court of Queen's Bench, the Courts of Sessions of counties palatine, or out of any of the Courts of grand sessions in Wales, in any of the cases aforesaid, such person or persons who by the laws of this realm are required to make a return to such writ of mandamus, shall make his or their return to the first writ of mandamus."

Sect. 4. "And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective Courts, with the leave of the said Courts respectively, to exhibit one or more information or informations in the nature of a quo warranto, at the relation of any person or persons desiring to sue or prosecute the same, and

within the meaning of that statute, so as to entitle the relator to costs under section 5. Section 1 recites, that

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who shall be mentioned in such information or informations to be the relator or relators against such person or persons, so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a quo warranto; and if it shall appear to the said respective Courts, that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective Courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons, against whom such information or informations in the nature of a quo warranto shall be sued or prosecuted, shall appear and plead as of the same Term or sessions in which the said information or informations shall be filed, unless the Court where such information shall be filed, shall give further time to such person or persons, against whom such information shall be exhibited to plead; and such person or persons, who shall sue or prosecute such information or informations in the nature of a quo warranto, shall proceed thereupon with the most convenient speed that may be; any law or usage to the contrary thereof in

anywise notwithstanding."

Sect. 5. "And be it further enacted and declared by the authority aforesaid, that from and after the said first day of Trinity Term, in case any person or persons, against whom any information or informations in the nature of a quo warranto shall in any of the said cases be exhibited in any of the said Courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices, or franchises, it shall and may be lawful to and for the said Courts respectively, as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said Courts respectively, to give judgment, that the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they, for whom such judgment shall be given, shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid."

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divers persons had of late "illegally intruded themselves into, and have taken upon themselves to execute, the offices of mayors, bailiffs, portreeves, and other offices within cities, towns corporate, boroughs and places;" and that where such offices were annual offices, it was difficult to try the right within a year; and where such offices were not annual offices, it hath been found difficult to try "the right of such persons to such offices before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs and places wherein they have respectively acted: And whereas divers persons who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen, than by writ of mandamus," &c. And enacts that returns shall be made to the first writs of mandamus which shall issue in such cases. Section 4 enacts, that in case any person shall usurp, &c., "any of the said offices or franchises," it shall be lawful to exhibit an information in the nature of a quo warranto against such person so usurping, &c., "any of the said offices or franchises." Section 5 enacts, that in case any person against whom an information in the nature of a quo warranto shall "in any of the said cases be exhibited," &c., shall be found guilty, "it shall and may be lawful to and for the said Courts respectively to give judgment, that the relator or relators in such information named shall recover his or their costs of such prosecution." It is submitted that the office of coroner of the borough of Wigan is an "office" within a "borough," within the meaning of the act. It appears by the special verdict, that before the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), the mayor of the borough for the time

being held the office of coroner, by virtue of his office. Therefore, if the intrusion had taken place anterior to that act, it would have been difficult to have contended that it was not an office within the 9 Anne, c. 20. By section 62 of the Municipal Corporation Act (a), the council of the borough are to "appoint a fit person, not being an alderman or councillor, to be coroner of such borough so long as he shall well behave himself in his office of coroner, and shall fill up every vacancy of the office of coroner of the borough;" &c., and none shall "take any inquisition which belongs to the office of coroner within such borough, save," &c.; "and every such coroner," for every inquisition, &c., "shall be entitled to have the sum of 20s.," &c., "to be paid by the treasurer out of the borough fund of such borough, by order of the Court of Quarter Sessions for such borough." To an ordinary reader it would seem that the only change made by that act was separating the two offices of mayor and coroner, and regulating the mode of election, and the payment of fees, for which the order of the Court of

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/(a) 5 & 6 Wm. 4, c. 76, s. 62, enacts, "that the council of every borough in which a separate Court of Quarter Sessions of the peace shall be holden, as is hereinafter provided, shall, within ten days next after the grant of the said Court shall have been signified to the council of such borough, appoint a fit person, not being an alderman or councillor, to be coroner of such borough so long as he shall well behave himself in his office of coroner, and shall fill up every vacancy of the office of coroner of the borough, by death, resignation, or removal, within ten days next after such vacancy shall have occurred, and none

thereafter shall take any inquisition which belongs to the office of coroner within such borough save only the coroner so from time to time to be appointed; and every such coroner, for every inquisition which he shall duly take within such borough, shall be entitled to have the sum of 20s., and also the sum of 9d. for every mile exceeding two miles which he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer out of the borough fund of such borough, by order of the Court of Quarter Sessions for such borough."

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Quarter Sessions was to be obtained. The question will be, whether that act, in separating the two offices, and providing that the council of the borough shall elect to the office, and the quarter sessions regulate the payment of fees, has rendered the office of coroner less an office within the meaning of the 9 Anne, c. 20, than it was before. The earliest case to be found in the books on this subject is that of *Rex v. Williams* (a). There the information set forth the incorporation of the town of Denbigh by letters patent, giving the corporation power to have and hold within the borough a Court of Record, and alleged the acceptance of these letters patent by the corporation; and that by virtue of these letters patent, the said Court of Record ought to have been held "before the bailiffs of the said borough for the time being, or one of them." It then charged the defendant with holding the Court, without legal warrant, he not being one of the bailiffs of the borough. After verdict against the defendant, and judgment signed for the relator's costs, error was brought; and it was held that the relator was not entitled to costs under the 9 Anne, c. 20. That case is, however, not analogous to the present. There it does not appear that the Judge of the Court of Record was appointed by the corporation, or even that the bailiffs were; nor would the judgment in that case have ousted the party. Mr. Justice *Denison* there says, "The charge is not within the act of Parliament of 9 Anne, c. 20. The information sets out the charter, which gives power to the bailiffs to hold this Court in the corporation: and it calls upon the defendant to know by what authority he held it in the absence of the bailiffs. But surely, this has no relation in the earth to the office of bailiff; nor will it be said that he could, upon this information, have been ousted of the office of bailiff." Besides, there the question arose on a writ of error brought by the defendant to reverse the

✓ (a) 1 Burr. 402; S. C. 1 W. Bl. 93; 2 Ld. Ken. 68.

judgment of costs. In *Rex v. Wallis* (a), the information was against a party for exercising the office of constable, which was clearly not a corporate office. In *Rex v. Hall* (b), the office there was commissioner of a Court of Requests within the corporate town of Bristol, which also is not a corporate office. Besides, in that case, it does not appear even that the right of appointment of the commissioner was in the hands of the corporation. The duty of coroner is not merely to take inquests on bodies. He is an officer to whom writs are addressed for various other matters. It is difficult to see why he should not be considered as much a corporate officer as a recorder, whose duties are distinct from a corporate character; and yet the latter is a corporate officer; *Com. Dig.* tit. "*Franchise*," (F 24). By statute Westm. 1, 3 Edw. 1, c. 10, coroners are to be chosen throughout the country; *Com. Dig.* tit. "*Officer*," (G 4). The mayor being coroner, must therefore have been coroner by charter, and so an officer of the corporation. [They referred to 7 Wm. 4, and 1 Vict. c. 78, s. 3, which directs coroners of boroughs to lay their expenses before the town council.] At any rate, if the Court entertain a doubt on the matter, they will allow the judgment for costs to stand, and leave the other side, if they think fit, to bring their writ of error; as was done in the case of *Rex v. Williams*; and not conclude the relator by granting this rule.

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Cowling, in support of the rule. It is submitted that the office of coroner is not an office, within the meaning of the 9 Anne, c. 20, s. 5. He is an officer appointed under the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 62, by the town council of the borough, and holds his office for life, unless guilty of misconduct. He, therefore, has a freehold in his office, and, when appointed, is not amenable to the corporation. He need not be a

✓(a) 5 T. R. 375.

✓(b) 1 B. & C. 237; S. C. 2 D. & R. 341.

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member of the corporation; nor is he, under that statute, paid by the corporation, but by the Court of Quarter Sessions. He merely exercises his duties within a limited district, which, consequently, is exempted from county rates. But should there be no separate Court of Quarter Sessions for the borough, then the coroner for the county, by sect. 64 (a), is to act within the borough; and for so doing, is to be paid as for inquisitions taken in the county. So that it is not even necessary that the corporation should have any coroner at all, and it is wholly accidental whether there will be a coroner in the corporation, which is complete without him. A coroner acts for, and is the servant of, the Crown; 4 *Inst.* 271. By sect. 63 of the Municipal Corporation Act, he is to make his return of inquisitions to the Secretary of State. He need not attend corporation meetings. He is not bound to hold inquests on the bodies of members of the corporation, as distinguished from those of other persons. His duties are entirely unconnected with the corporation. He acts sometimes as a deputy of the sheriff. The only pretence for saying that he is a corporate officer is, that he acts within the limits of the borough, which is a corporation. It is true that he is appointed by the council of the borough, and that his fees come out of the borough fund; but it is submitted that that is not sufficient to give to his office the character of a corporate office. The appointment is not made in exercise of a franchise, but as a duty consequent on having a Court of Quarter Sessions.

✓ (a) 5 & 6 Wm. 4, c. 76, s. 64, enacts, "that in every borough in and for which a separate Court of Quarter Sessions of the peace shall be holden no person from and after the end of this present year shall take any inquisition which belongs to the office of coroner within such borough, save only the coroner for the county or district in which such borough is situated; and the co-

roner for such county or district, for every inquisition which he shall duly take within any place or precinct within any such borough, shall be entitled to have such rateable fees and salary as would be allowed and due to him, and to be allowed and paid in like manner as for any other inquisition taken by him within such county;" &c.

The office would probably continue if the place were disfranchised. A constable is appointed by the corporation, and is paid out of their funds, but he is not a corporate officer (a). So, although a corporation appoint a schoolmaster, or a clergyman, within a corporate town, and the funds out of which both are paid be corporate funds, or the advowson of the living which the latter holds belongs to the corporation, that does not render them corporate offices. A county coroner, although elected only for a district; 7 & 8 Vict. c. 92, s. 19; is as much an officer of the Crown as he ever was; and does not become an officer of the district. Supposing the borough had not applied for a separate Court of Quarter Sessions, and there had been no coroner for the borough at all, could the county coroner acting within the borough be said to be a corporate officer? The stat. 9 Anne, c. 20, it is submitted, does not apply to all offices in corporate towns, as at first sight might appear to be the case; but only to corporate offices. In the report of *Rex v. Williams*, in Lord *Kenyon's Reports* (b), Lord *Mansfield* there says, "Two questions are made, first, whether the statute judgment be good; secondly, whether the common law judgment is good. The first depends on a sound construction of the stat. 9 Anne, c. 20. All corporations consist of two classes; the officers, or magistracy, and the burgesses, or members who are to be governed; and the view of the act was plainly to comprehend both these; for, as before, the only remedy was by information at the King's suit, though, by the frequent sittings of Parliament, and the Crown having granted out these franchises to some one or other, the dispute was rather of a civil nature, between the contending parties who had the right, than any wrong done to the King, who had granted out the franchise: this act, therefore, puts it, as near as may be, on the foot of a civil action, and gives costs according to the event of the suit, that so the right between

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✓ (a) *Rex v. Wallis*, 5 T. R. 375.

(b) 2 Ld. Ken. 68, 73; S. C. 1 Burr. 402; 1 W. Bl. 93.

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John, and Thomas, may be decided; but does not extend to every usurpation of offices, which may be out of a corporation, as stewards of leets, &c. The act is uncommonly clear, and express, as to this point, and the word 'franchise' in the title (which is no part of the law, but only an epitome of it, and rather the province of the clerk to settle; and is never read but once, nor the question put concerning it, until the law is passed), must be interpreted from the body of the act, which plainly restrains it to freedoms," &c. The report in *Wm. Blackstone's Reports* (a) is substantially the same. The Court has always put a strict construction on the words in 9 Anne, c. 20. "Places" has been held to mean places ejusdem generis with those before enumerated; *Rex v. Wallis* (b). In that case, the information was for exercising the office of constable of Birmingham; and because Birmingham was neither a city, town corporate, or borough, they held it could not come under the word "place," which was not to be taken in its larger sense, which would have rendered the former words unnecessary, but to be construed as extending only to places of the same kind with those before enumerated. So in *Rex v. Richardson* (c), which was on the construction of a statute in pari materiâ with the 9 Anne, c. 20, the Court held that the "portreeve" of a "borough," although expressly named in the act, yet not being a corporate officer, was not within the meaning of the act. In *Rex v. Hall* (d), the commissioner of a Court of Requests had as great a title to be considered a corporate officer as a coroner has. These cases were all reviewed and confirmed in an elaborate judgment of Mr. Justice Bayley, in *Rex v. McKay* (e); and, therefore, it may be considered as settled law, that to come within the 9 Anne, c. 20, it must be a corporate office. Whether a recorder is a corporate officer, as, it is said, is stated in *Com. Dig.* tit. "Franchise," it is not necessary to discuss; that is no authority as to his coming

(a) Vol. 1, p. 93.

✓(b) 5 T. R. 375.

✓(c) 9 East, 469.

✓(d) 1 B. & C. 237.

✓(e) 5 B. & C. 640; S. C. 8 D. & R. 393.

within the 9 Anne, c. 20. As to what is urged respecting the course to be taken if the Court have any doubt, it is submitted, that as no judgment has as yet been pronounced by the Court itself as to costs, the proper course would be, (at all events, if the opinion of the Court should be in favour of the defendant), not to allow any judgment to be entered for the costs, but to let the relator bring his writ of error, which it is perfectly competent for him to do. In *Rex v. Williams (a)*, the judgment for costs was that of the great Court of Sessions for the county of Denbigh. The only course that could be pursued in that case was for the defendant to bring a writ of error.

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Cur. adv. vult.

PATTESON, J.—I have looked into the acts of Parliament, and the cases which have been cited, and whatever may have been the case under the original charter, whether before the Municipal Corporation Act the coroner was a corporate officer, I do not think it necessary to consider. Indeed, I do not very well see how the question could ever arise; as the mayor united in his own person the offices of mayor and coroner, and, in the former capacity, he was unquestionably a corporate officer. The Municipal Corporation Act has, however, destroyed that state of things; for it enacts, that wherever a borough has a separate Court of Quarter Sessions, the council of the borough may appoint a coroner; but where it has not a separate Court of Quarter Sessions, the coroner for the county or district is to act. In the present case, the borough in question has a separate Court of Quarter Sessions, and the question now to be decided is, whether the coroner appointed by the council of this borough can be said to be a corporate officer since the Municipal Corporation Act, so as to come within the statute of Anne.

Now, it seems to me, that he is not a corporate officer within the meaning of the statute of Anne. He is the

✓ (a) 1 Burr. 402; S. C. 1 W. Bl. 93; 2 Ld. Ken. 68.

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Queen's officer, his duties are entirely independent of the corporation, and although he is appointed by the corporation, it does not make him their officer.

I, therefore, think that he is not entitled to costs under the statute of Anne.

It was urged, however, that even should I be of this opinion, I should yet allow the relator to have judgment for his costs, and not preclude him by this decision, but leave the defendant to bring a writ of error, as it was said was done in the case of *Rex v. Williams (a)*; but I see no difficulty in pronouncing in favour of the defendant on the present occasion, as it is equally open to the other side to bring a writ of error, on the ground that the judgment is wrong, in not awarding costs. I, therefore, feel bound to make the present rule absolute.

Rule absolute.

✓(a) 1 Burr. 402; S. C. 1 W. Bl. 93; 2 Ld. Ken. 68.

TRIPP and Another, Executors of Skrine v. Sir
 W. T. S. MASSEY STANLEY, Bart.

On a motion to enter up judgment on an old warrant of attorney, an affidavit that the deponent has seen the defendant alive within three months, and that he is now residing at Paris, is insufficient; unless it also state that his residence there is unknown.

BROS moved for leave to enter up judgment on a warrant of attorney more than a year and a day old.

It appeared upon affidavit that the warrant of attorney was given by the defendant to Skrine on the 25th of July, 1844, on which day it bore date. That Skrine died on the 20th of March, 1846, appointing Tripp and another person his executors. The application was made on the affidavit of the attorney of the executors, which set out these facts, and also a copy of the warrant of attorney; and which stated, "that he personally knows that the said Sir W. T. S. Massey Stanley, Bart., is now living, this deponent having

A party may, by the terms of the warrant of attorney, waive the necessity of an affidavit being made, of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed.

seen him alive, and having conversed with him within the period of three months now last past; and that he verily believes the said Sir W. T. S. Massey Stanley, Bart., did, shortly after he this deponent so saw him, go to reside, and that he does now reside at Paris, in the kingdom of France."

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Bros submitted that he was entitled to his rule, on the authority of *Bayley v. Western* (a). There the defendant had been seen alive in England on the 20th of February, but at the time of the application was residing in France, and the Court granted the rule in Easter Term.

PATTESON, J.—There, however, it appeared upon the affidavit that it was not known where in France he was living. It does not appear here but that his residence in Paris is well known. I think the Court should have some information upon that point.

Bros then called the attention of the Court to a clause in the warrant of attorney, as it appeared upon affidavit, which he submitted dispensed with the necessity of any affidavit at all. The clause was as follows:—"And it thereby also declared, that in order to enter up judgment upon and by virtue of the within written warrant of attorney, it should not be necessary to make any affidavit of the fact of the said Sir W. T. S. Massey Stanley being alive at or shortly before the time of entering judgment, or to obtain a Judge's order, or a rule of Court to warrant such judgment; and notwithstanding the within written warrant of attorney should be a year old or upwards at the time of the entry of such judgment; any rule or practice of the Court to the contrary in anywise notwithstanding."

PATTESON, J.—I see no reason why such a stipulation in a warrant of attorney should not be good. That a writ of

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error shall not be brought, is a common agreement, and the Court have always held parties to it (a). You may take a rule.

Rule absolute.

(a) See *Camden v. Edie*, 1 H. Bl. 21; *Cates v. West*, 2 T. R. 183; *Brown v. Lord Granville*, 2 Dowl. 796; *Executors of Wright, Bart. v. Natt*, 1 T. R. 388. As to waiver of a scire facias to revive a judgment, see *Morgan v. Burgess*, 1 Dowl. 850, N. S. ✓

REGINA v. JUSTICES OF LANCASHIRE.

(BUTLEY v. ASHTON-UNDER-LYNE).

A pauper, who was a married woman, and whose husband had deserted her, was removed, under an order of removal, to the place of her maiden settlement, on the 26th of September, 1846. An appeal was entered and respited at the Michaelmas Sessions.

The appellant township, on the 1st of

A RULE had been obtained in last Easter Term, calling on the justices of the peace for the county of Lancaster, to shew cause why a mandamus should not issue, directed to them, commanding them to enter continuances and hear an appeal against an order under the hands and seals of two justices of the county, for the removal of Elizabeth Leonard, the wife of Matthew Leonard, and their three children, from the parish of Ashton-under-Lyne, in the county of Lancaster, to the township of Butley, in the county of Chester; upon notice of the rule to be given to the said justices, and also to the churchwardens and overseers of the poor of the said parish of Ashton-under-Lyne, or some of them.

December following, obtained a warrant for the arrest of the husband, who was not apprehended till the 24th of that month, and, consequently, too late to give notice of appeal for the Epiphany Sessions. At those sessions, however, the appellant parish appeared and asked to have the appeal respited, on statement of these facts, to the Easter Sessions. The Epiphany Sessions having called the respondents before them, and heard their objections, namely, that no notice of appeal having been given, the sessions had no power to respite the case; and, that even if they had, they would not consider the circumstances such as to call upon them to exercise it; made an order respiting the appeal to the Easter Sessions, on payment of the costs of the day by the appellants, without prejudice to the objection of want of notice of appeal. A valid notice of appeal was given for the Easter Sessions, and on the case being called on, the objection was renewed, that no notice had been given for the Epiphany Sessions; and the sessions decided that the objection was fatal: Held, that the Epiphany Sessions had clearly power to respite, if in their discretion they thought fit; and that they must be taken to have exercised their discretion, reserving the question of their power; that the Easter Sessions had therefore decided wrongly; and that a mandamus would lie to the sessions to enter continuances and hear the appeal.

It appeared upon the affidavits in support of this rule, that on the 2nd of September, 1846, an order was made, under the hands and seals of two justices of the county of Lancaster, for the removal of Elizabeth Leonard, the wife of Matthew Leonard, and their three children, from the parish of Ashton-under-Lyne, in the county of Lancaster, to the township of Butley in the county of Chester. The examination of Elizabeth Leonard, upon which the order proceeded, and a copy of which was annexed to the affidavits, shewed that the township of Butley was her maiden settlement, that her husband had deserted her, and that she did not know where his settlement was. The female pauper and her children were removed under this order, on the 26th of September, to the appellant township. The overseers of the poor of the appellant township, believing the settlement of the said Matthew Leonard to be in Liverpool, by his having been born and having served an apprenticeship there, entered and respite an appeal against the order at the quarter sessions held by adjournment at Salford in and for the said county of Lancaster, on the 26th day of October, 1846; which were the first sessions after the removal of the paupers. That from the time of such removal, immediate steps were taken and every possible exertion was made for the discovery of the said Matthew Leonard; a police officer, with a warrant for his apprehension granted under the Vagrant Act, for neglect of family, having been in search of him in several towns in Lancashire, where he had been heard of; but he was not apprehended until the 24th of December, 1846, which was too late to give the notice and grounds of appeal for trial at the following Epiphany Sessions. That the said overseers of Butley could not obtain the necessary facts and evidence in support of the appeal in the absence of the said Matthew Leonard. That at the Epiphany Sessions held by adjournment at Salford aforesaid, in and for the said county of Lancaster, on the 11th day of January, 1847,

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an application was made to the Court by the appellants to adjourn the appeal on an affidavit stating the above facts, a copy of which was annexed to the affidavits. That the Court directed the application to be renewed on the 13th day of January, and that in the mean time notice thereof should be given to the respondents; and which notice, with a copy of the said affidavit, was accordingly the same day given to the respondents' attorney; and they on the said 13th day of January appeared by their counsel at the same last named sessions and opposed the application for adjournment, on the grounds that the applicants having given no notice of appeal, the Court had no power to adjourn it; but the Court saying the application was reasonable, did adjourn the appeal on payment by the appellants to the respondents of the costs of the day. That such costs of the day were taxed at 2*l.* 14*s.* 6*d.*, and were paid by the appellants to the respondents on or about the 20th day of February. That notice and grounds of appeal were served by the appellants on the respondents, on the 20th day of March, for trial at the Easter Sessions, being fourteen clear days from the commencement of such last named sessions, holden by adjournment at Salford aforesaid, in and for the said county of Lancaster. That on the 12th day of April, the appeal was duly entered for trial, and being called on on the 14th day of April, at such adjourned sessions, the respondents' counsel required the appellants to prove service of their notice and grounds of appeal, and they did prove the service thereof on the said 20th day of March. That the respondents' counsel then renewed the objection made at the former Epiphany Sessions, that as no notice of appeal had been given prior to those sessions, the Court had no power to adjourn the appeal to the last sessions; and the Court being of this opinion, refused to hear the appeal, and confirmed the order of removal.

The following was a copy of the order made by the Epiphany Sessions:—"At the General Quarter Sessions," &c. "The appeal of," &c. "The same appeal is by this Court respited and adjourned until the next General Quarter Sessions of the Peace here to be holden by adjournment, on payment of costs of the day by the said appellants to the said respondents."

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The affidavits in answer stated, that the warrant for the apprehension of Matthew Leonard was not taken out till the 1st of December, 1846. That the practice at the Lancashire Sessions required fourteen days' notice in cases of appeals against orders of removal. That at the Epiphany Sessions, after argument as to the sufficiency of the affidavits on which the motion to respite was made, the Court, with the assent of the appellants' counsel, directed that the appeal should be further respited till the ensuing sessions, and that the further respite, or the accepting the costs of the day by the respondents, should not preclude or prejudice them, when the appeal should be called on at the subsequent sessions, from taking advantage of the objection then made, that no notice of appeal had been given prior to the Epiphany Sessions; but that they should be at full liberty to avail themselves of such objection (a).

Townsend, on behalf of the overseers of the parish of Ashton-under-Lyne, now shewed cause. The sessions acted rightly in dismissing this appeal, and this Court will not interfere with their decision. The question would have been different had the Epiphany Sessions undertaken to deal with the objection; but all that that sessions did was

(a) An objection was raised in the course of the argument that the entry of the order of the Epiphany Sessions upon the sessions books was conclusive evidence of what that order was, and that it was not competent to the respondents to adduce evi-

dence to import into it other terms than those which, on the face of it, it contained. But nothing turned upon this objection, as eventually the question was argued as if the whole facts were before the Court.

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to reserve the question for the consideration of the Easter Sessions. The Easter Sessions, therefore, by the consent of the appellants, were as competent to deal with the objection as the Epiphany Sessions were. Being so, they have held the objection fatal. It is shewn that, by the practice of the sessions, fourteen days' notice of appeal was required to be given. If a less notice had been given in the present case, and the sessions had held it sufficient, this Court would not have interfered; for the sessions are the proper judges of their own rules of practice. In *Reg. v. The Justices of Montgomeryshire (a)*, it was so held, and that this Court will not interfere with their determinations respecting them, unless the rules on which they have acted are so unreasonable as to be illegal. In that case, the sessions required twenty-eight days' notice of trial in cases of respited appeals, although the notice usually required varies from five to fourteen only; and this Court refused to interfere. Here no notice at all was given, and therefore the sessions might clearly have refused to hear the appeal. The late case of *Reg. v. Justices of Somersetshire (b)*, shews that when the justices have decided on a preliminary point which is a question of fact, this Court will not interfere. It is by no means clear that this was a proper case for any indulgence, even if the sessions had been disposed to grant it. The appellants did not take out a warrant for the apprehension of the husband till the 1st of December. They might have given notice at the Epiphany Sessions of their intention to apply for a further respite of the appeal; although they had not succeeded in apprehending the husband. He referred to *Nol. Poor Laws*, p. 519, 525, 4th ed.

Pashley, in support of the rule. It is clear that the Epiphany Sessions meant to exercise their discretion in the

✓ (a) *Ante*, vol. 3, p. 119.

✓ (b) Since reported, *ante*, vol. 4, p. 741.

appellants' favour, provided they had the power; and the only objection which could have been reserved to the respondents would be as to the power of the sessions to adjourn the appeal. The Easter Sessions, therefore, proceeded on the ground that the Epiphany Sessions had no power to adjourn the appeal, where no notice of appeal had been previously given; and in so doing, it is submitted, they were clearly mistaken, and this Court will correct their error. In *Rex v. Justices of Gloucestershire (a)*, it was held that justices were bound to receive an appeal against an order of removal if offered at the next sessions, although no notice of appeal has been given. There the reason assigned was that the appellants had not been able to get their witnesses ready, till it was too late to give such notice; and the sessions having refused to receive the appeal and adjourn the consideration of it till the following session, this Court granted a mandamus to compel them to receive it. That case is expressly in point as shewing that the Epiphany Sessions had not only the power, but were bound to adjourn the appeal under the circumstances. In *Rex v. The Inhabitants of Kimbolton (b)*, the statement of grounds of appeal had been served upon the attorney of the respondents instead of upon the overseers, and it was held that the sessions might, if they thought fit, adjourn the appeal; such power being incident generally to them as a Court, except where taken away by statute. The cases of *Rex v. The Inhabitants of Thackwell (c)*, and of *Reg. v. Justices of London (d)*, also establish the power of the justices to adjourn the appeal. The cases of *Reg. v. Justices of Montgomeryshire*, and *Reg. v. Justices of Somersetshire*, which have been relied on by the other side, were questions as to how far this Court would interfere with the discretion of the sessions in

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✓(a) 1 Dougl. 191.

& R. 61.

✓(b) 6 A. & E. 603; S. C. 1 N. & P. 606.

(d) 2 Car., Ham. & Allen's New Sess. Cas. p. 410.

✓(c) 4 B. & C. 62; S. C. 6 D.

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administering rules of practice; not as here, whether it is not competent to define their jurisdiction.

Cur. adv. vult.

PATTESON, J.—This was an application for a mandamus to compel the justices of the county of Lancaster to enter continuances and hear an appeal against an order of removal.

The facts appear to be simply these. The order of removal was made on the 2nd of September, 1846, and no notice of appeal having been given, the removal of the female pauper took place on the 26th of the same month. The next sessions were held on the 19th of October. The appellants gave no notice of appeal for those sessions, nor were they bound to do so; but they entered and respited the appeal at those sessions. Up to this time, therefore, every thing was regular. Then it appears that without any notice of appeal being given by them, and in the absence of the respondents, the appellants applied at the Epiphany Sessions to have the appeal respited; and they did this on an affidavit that Matthew Leonard, the husband of the pauper, had absconded, and that they had not been able to apprehend him till the 24th of December; consequently, too late to give a notice of appeal for those sessions. It appeared, however, that they had not applied for a warrant till the 1st of December. The Court of Quarter Sessions thought it was not reasonable to respite the appeal, without hearing what the respondents had to say on the subject. I apprehend that it cannot be disputed that the Epiphany Sessions had the power to respite the appeal, if they in their discretion thought fit; but that they were not bound to do so. It was not a matter of right on the part of the appellants, but of discretion with the sessions. They accordingly directed the matter to stand over, and that notice should in the mean time be given to the respondents. On a subse-

quent day in the same sessions, the matter was again gone into, both parties attending. It was then objected by the respondents that the sessions had no power to respite the appeal, because no notice of appeal previous to the sessions had been given to the respondents; and that even if they had, they would not consider the circumstances such as to call upon them to exercise it. The sessions then, after hearing both parties and upon affidavits of the facts which have been stated, came to the decision, with the consent of both sides, that the appeal should be respited to the Easter Sessions, without prejudice to the objection to the want of notice of appeal. At the Easter Sessions, upon the appeal being called on, the appellants were required to prove their notice of appeal, and they proved a notice of appeal for the Easter Sessions, which had been served on the 20th of March. It was however insisted by the respondents that a notice of appeal for the Epiphany Sessions also ought to have been given.

I have read over the affidavits and considered them fully, and I am of opinion, that the Epiphany Sessions had the intention to respite the appeal if they had the power; and I am satisfied that, at the Easter Sessions, no dispute was raised as to the discretion of the Epiphany Sessions in granting the application, but only as to their power. That being so, and the sessions having decided wrongly in holding the Epiphany Sessions had not the power to respite the appeal, the rule for a mandamus must be absolute.

Rule absolute.

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Doe dem. Cox v. Roe.

In an ejectment under the 4 Geo. 2, c. 28, where the premises are kept locked, and access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not; the affidavit stating those facts is sufficiently positive, if it state a *belief* only, that there is no sufficient distress on the premises.

HANCE moved for judgment against the casual ejector, in an action of ejectment under the 4 Geo. 2, c. 28.

The affidavits in support of the rule were made by Robert Spencer, an auctioneer and appraiser, and George Saunders, clerk to the attorneys of the lessor of the plaintiff. The auctioneer stated, that "having been directed to distrain the goods and chattels to be found on the premises in the occupation of J. H. Hembury, situate in Ballard's Lane, Finchley, in the county of Middlesex, being the premises sought to be recovered in the above action, he, on the 28th day of October last, attended on the said premises, for the purpose of making such distress, when he was unable, notwithstanding he used every exertion in his power legally to do so, to obtain admission to the said premises, for the purpose of making such distress; and he was then informed by a boy who was working in the garden appurtenant to and forming part of the said premises, that the same were locked up, and that the said boy had not the key thereof, and was unable to give him admission thereto." "That he again attended for the like purpose on the 29th of October last, when, on ringing the bell attached to the premises, the same boy came from the back part of the premises to answer this deponent; when this deponent required and demanded to be admitted into the said premises, in order to ascertain if any sufficient distress was to be found therein, and for the purpose of making such distress as aforesaid; but the said boy refused to admit this deponent, saying that he had not the key of the premises. That the deponent, on the day last aforesaid, repeatedly rung the bell attached to the premises, and used every exertion to obtain admission thereto; but was unable to do so." The other deponent, R. Saunders, who went for the purpose of serving the declaration and notice, deposed to similar attempts to obtain admission on the premises without effect;

that the gate was kept locked, and no one answered the ringing or knocking at the gate; that he was informed by the neighbours and the policeman on duty that it was no use ringing or knocking at the premises, for the inmates of the premises were not in the habit of answering any applicants at the gate of the said premises when they were at home. That on one occasion, he was told by the tenant of the adjoining premises that the said J. H. Hembury was actually in the premises at the time; and that he waited in front thereof for upwards of two hours, after having repeatedly rung and knocked without being answered, without avail. That he affixed the declaration and notice on the door of the premises. "And this deponent further saith, that he verily *believes* that on the said 28th day of October last, and that at the time when this deponent so as aforesaid affixed the said declaration and notice on the door of the said premises, there was no sufficient distress to be found upon the said premises countervailing the said arrears of rent then due." The affidavits contained all the other requisite facts to bring the case within the statute.

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Hance. The difficulty suggested in this case is, that the affidavit should have sworn positively and in express terms that there was no sufficient distress on the premises (*a*). But it is submitted, that when the premises are kept locked up, and access to them not permitted, to see whether in fact there is a sufficient distress, such an affidavit cannot with any reason be demanded. In *Doe d. Chippendale v. Dyson* (*b*), Lord *Tenterden* interprets the words of the statute "no sufficient distress was to be found" to be "no sufficient distress which can be got at." His Lordship there says, "In this case the doors are locked up, so that the landlord cannot get on the premises to distrain: there

(a) See *Rees v. King*, cited in 1 Dowl. 180, N. S. ✓
2 B. & B. 514; *Doe v. Roe*, 2 ✓(b) M. & M. 77.
Dowl. 413; *Doe d. Hicks v. Roe*,

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is, consequently, no sufficient distress, for there is no available distress at all." Here the parties in possession of the premises prevent the possibility of a search being made, by refusing admittance on the premises.

PATTESON, J.—I think you shew enough to entitle you to judgment (a).

Rule granted.

(a) In *Doe d. Green v. Roe*, Bail Court, M. T. 1844, a rule nisi only was granted, by the same learned Judge, in a case where the affidavit shewed that the premises were kept shut, and

were unoccupied; but did not shew that the parties were obstructed in their search, or even contain a statement of a belief that no sufficient distress existed.

COOKE v. WRIGHT.

It is no cause to shew against a motion to charge a defendant in execution, who has been brought up on a writ of habeas corpus ad satisfaciendum, that the warrant of attorney on which the judgment has been signed, was given without consideration, and the judgment signed in breach of good faith. Such facts are the proper grounds of a

FORTESCUE moved, on the return of a writ of habeas corpus ad satisfaciendum, to charge the defendant in execution in the above suit.

Lush, on behalf of the defendant, prayed that the Court would direct the motion to stand over till an opportunity had been afforded of discussing a rule, which he now moved for, to set aside the warrant of attorney herein, and all subsequent proceedings, or the judgment signed herein, and all subsequent proceedings; on the ground that there was no consideration for giving the warrant of attorney, and that the judgment thereon had been signed against good faith, and contrary to and in violation of the agreement made between the parties on the execution of the warrant of attorney.

The Court will, therefore, not postpone the motion to charge the defendant in execution, until the other rule comes on to be discussed.

Fortescue submitted that the defendant could not be heard to shew cause against this rule, which was one of course. It was competent to the defendant to move for his discharge afterwards on these grounds.

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[Master *Bunce* stated that the motion to charge defendant in execution was a motion of course; and that the motion of Mr. *Lush* should be an independent one, to discharge the defendant out of custody as to this execution.]

It being clear that no further expense was incurred by so doing,

Fortescue accordingly took his motion,

And *Lush* took a rule nisi to set aside the warrant of attorney, and all subsequent proceedings, or the judgment and all subsequent proceedings; and why the defendant should not be discharged out of the custody of the keeper of the Queen's Prison, as to the execution in the above action (a).

(a) Cor. *Patteson*, J.

Ex parte GREY.

PRENTICE moved that an attorney of the name of Grey might be admitted to take out his certificate. The application was not opposed; and the only difficulty arose upon the applicant's own affidavit, by which it appeared that, eighteen years ago, he had been tried and convicted on an indictment for a conspiracy, in concerting a fiat in

The Court refused to allow an attorney to take out his certificate, where it appeared that he had been found guilty on an indictment for a conspiracy

to procure a fiat, and had been sentenced to, and had undergone, eighteen months' imprisonment; although the motion was unopposed, and the fact appeared only on his own affidavit, and he swore he was not guilty of the offence; and it had occurred eighteen years ago, since which time he had been engaged as law clerk in the offices of several attorneys.

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bankruptcy, and had been sentenced to eighteen months' imprisonment, which he had undergone. That Chief Justice *Abbott*, before whom he had been tried, had said, in his charge to the jury, that there was no conclusive evidence against him; and that a new trial had been moved for and only refused on a technical ground. That since that time down to the present, he had been engaged as law clerk in the employment of several attorneys, of whom three or more were named. He positively swore that he was not guilty of the offence for which he had been tried. Under these circumstances, after so great a lapse of time, and when he gave this full information respecting himself, giving the name of the attorney who conducted the prosecution, so that every inquiry might be made, and opportunity of opposition offered to this motion, it was submitted that the Court would permit him to renew his certificate. There was no case at all in point upon this application; but the visiting him now with the consequences of that offence, by refusing him his certificate, would be very much the same, as if, supposing he had taken it out every year, it should now be sought to take a step against him for the by-gone offence; which, according to an *Anonymous case* (a), could not be done.

ERLE, J.—I think it my duty to refuse this application. There was a case in the full Court in the present Term, in which a somewhat similar application, under circumstances in certain respects more favourable than the present, was made, and, after consultation amongst the Judges, refused (b).

(a) 1 Dowl. 174.

(b) His Lordship probably referred to the case of *Ex parte Macey* (not yet reported), where an attorney was charged with having, in the conduct of a certain cause, offered a bribe to a witness to depose to a particular fact. The matter was referred to the Master to report

upon, and on his report that the charge was true, the attorney was ordered to be struck off the roll. On the first day of the present Term, Sir *F. Kelly* moved to rescind the rule striking him off the roll; and the Court, after taking time to look at the affidavits, refused the application.

The jurisdiction of this Court is exercised not only with a view to maintain honesty and uprightness in the conduct of its officers; but we have also to look at the penal consequences with which offences are visited, in order that persons may not hope, after committing crimes, that they can come here, at however long an interval, and ask to be discharged from the consequences attendant upon their commission.

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There are, no doubt, very many degrees of guilt in a conspiracy to procure a fiat; but many cases might be imagined in which persons might, by so doing, be guilty of the most odious offence.

Without, however, going into that question, it seems to me, that notwithstanding what is said about Chief Justice *Abbott's* opinion as to this person's guilt, the offence in that learned Judge's opinion was of that serious character, and he entertained so slight a doubt of the correctness of the verdict, that he thought it necessary to sentence the party to the severe punishment of eighteen months' imprisonment.

It seems to me that it would be highly inconvenient, if after so great a lapse of time, and after the solemn inquiry then had, the applicant could come here now and question the propriety of that sentence.

Motion refused (a).

✓ (a) See *In re King*, 8 Q. B. 129.

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SMITH v. WETHERELL, Clerk.

Under the 1 & 2 Vict. c. 110, s. 55, a vesting order is "an order appointing an assignee" of the prisoner, in pursuance of the act, within the meaning of that section.

The provisional assignee of an insolvent prisoner, in whom the estate and effects of such prisoner are vested by an order of the Insolvent Debtors' Court, under 1 & 2 Vict. c. 110, s. 37, may therefore apply for and obtain a sequestration of the profits of the prisoner's benefice, under sect. 55 of that statute.

A RULE had been obtained in Trinity Term last, calling upon the Bishop of Peterborough, on notice of this rule to be given to his secretary; and upon Samuel Sturgis, provisional assignee of the estate and effects of insolvent debtors in England, upon notice of this rule to be given to him or his attorney; respectively to shew cause why the sequestration mentioned in the certificate of the said bishop to have been issued on behalf of the said Samuel Sturgis should not be set aside; and why the said bishop should not forthwith proceed to execute the writ of sequestrari facias issued in this action; and why the said bishop should not forthwith pay over to the plaintiff the sum of 114*l.* in the said certificate mentioned.

It appeared from the affidavit in support of the rule, that a judgment was obtained against the defendant in the present action on the 9th of March, 1846, for 107*l.* 17*s.* 3*d.* debt, and 9*l.* 10*s.* costs. That on the 4th of July in the same year, a writ of testatum fieri facias was issued, directed to the sheriff of Northamptonshire, who made a return of nulla bona, and that the defendant was a beneficed clerk within the diocese of the Bishop of Peterborough. That on the 6th of July, a writ of sequestrari facias was issued in this cause out of this Court, directed to the Bishop of Peterborough, commanding him to enter the rectory and parish church of the defendant, and take and sequester the same until he should have levied the amount of the debt, interest, and costs. That on or about the 6th of July, the writ was duly forwarded to the secretary of the Bishop of Peterborough to be executed, and was believed to have been duly received and duly published. That on the 8th of May, 1847, a rule of this Court was made that the Bishop of Peterborough "should certify what, if anything, he had levied under the said writ of sequestrari facias." That on the 28th of May, on search being made at the Treasury Office

of this Court, the following return was found to have been made. "In the Queen's Bench. Between William Smith, plaintiff, and the Rev. Charles Wetherell, defendant. In pursuance of the rule made in this cause on the 8th day of May instant, I do certify as mentioned in the within affidavit of Henry Pearson Gates, sworn the 20th day of May, 1847, and annexed hereto. Dated this 26th day of May, 1847. (Signed) G. Peterborough." The affidavit annexed was as follows: "Henry Pearson Gates, of Peterborough, in the county of Northampton, gentleman, and the sequestrator named and appointed by the Lord Bishop of Peterborough, maketh oath and saith, that there is at present in the hands of him this deponent, as sequestrator of the proceeds of the rectory of the above named defendant, a writ of sequestration at the suit and instance of Mr. Samuel Sturgis, the provisional assignee of the estate and effects of the above named defendant, directed to him this deponent, to satisfy the sum of 15,774*l.* 14*s.* 9*d.* That the said writ is unsatisfied, and was issued and delivered to this deponent on behalf of the said Samuel Sturgis previously to the issuing of the sequestrari facias by the plaintiff in this cause. That there is at present a sum not exceeding the sum of 114*l.* in the hands of the said bishop or of this deponent as such sequestrator, and which sum is applicable, as deponent believes, to the said sequestration of the said Samuel Sturgis, and that the said bishop has not levied or made anything under the said writ of sequestrari facias of the said plaintiff."

The affidavit in answer shewed that the defendant, being a prisoner in the Queen's Prison for debt, the Court for Relief of Insolvent Debtors, on the petition of one William Thurmott, a detaining creditor of the defendant, made a vesting order, which was still in full force, on the 17th of March, 1846, vesting the estate and effects of the defendant in Mr. Samuel Sturgis, the provisional assignee of the estate and effects of insolvent debtors in England. That Sturgis, as provisional assignee, presented a petition to the Bishop

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of Peterborough to levy the sum of 15,744*l.* 14*s.* 9*d.*, the amount of the debts admitted by the defendant to be due and owing by him, or for the payment of such greater or less sum as should ultimately be the amount of debts found to be due and owing by the defendant to his several creditors, together with interest on such of the said debts as carry interest, and also the costs of levy and reasonable and proper expenses; and which said petition was accompanied with a certified copy of such vesting order. That the Bishop of Peterborough thereupon granted a fiat for such sequestration, which was accordingly duly published. That on the 12th of April, 1847, the Court for Relief of Insolvent Debtors made an order "that the proceedings taken by the provisional assignee to obtain sequestration of the insolvent's benefice at," &c., "in this matter, be confirmed; and that when funds shall be realised under the sequestration, the receiver appointed (the bishop's secretary) be directed by the provisional assignee to bring such funds into Court to the credit of the estate in the usual course." It was sworn by the attorney acting for Sturgis in the several causes, matters, and proceedings, in which Sturgis was a party in his official capacity, "that the said S. Sturgis, as such provisional assignee, is, in most insolvents' estates the only assignee, and that the said Court for Relief of Insolvent Debtors has at all times considered him to have the same powers as a sub-assignee, and he has been in the regular habit of selling estates, transferring property, and assigning outstanding interests as the assignee of estates, as occasion required, for the purpose of realising the insolvents' estates. That the said Court for Relief of Insolvent Debtors in many cases has refused to appoint a sub-assignee, directing the said provisional assignee to take the necessary steps to get in the insolvents' estates. That it has been at all times the object of the Court to maintain and exercise that usefulness in the provisional assignee; because through him, an officer of the Court, the estates are administered in a cheaper mode, and the funds are secured to creditors;

inasmuch as all funds which are realised by the provisional assignee are forthwith paid by him into the said Court to the credit of the particular estate to whom such funds belong, and do not remain at all in his hands; and such funds, when paid into Court, are then administered by the Court." A certified copy of the vesting order, which was in the usual form, was attached to the affidavits.

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Martin and *Addison* now shewed cause on behalf of the provisional assignee. The question for the decision of the Court is, whether a provisional assignee has authority, under the 55th section of 1 & 2 Vict. c. 110, to procure the sequestration of the benefice of a clergyman, being an insolvent debtor under that act; and it is submitted that he has. The first statute in which the term "provisional assignee" seems to have been introduced, is the 1 Geo. 4, c. 119; by sect. 1 of which statute, a Court was constituted, to be called "the Court for relief of Insolvent Debtors," who were to appoint, amongst other officers, "a provisional assignee." By sect. 4, the insolvent, upon presenting a petition for discharge, was to execute a conveyance "of all the estate, right, title, interest, and trust of such prisoner to all the real and personal estate and effects of every such prisoner," "so as to vest all such real and personal estate and effects in the provisional assignee of the said Court." The provisional assignee under that act was therefore not a person who took the estate of the insolvent by any general enactment, but by virtue of the assignment made by the prisoner on presenting his petition. The question that now arises is under the 55th section of the 1 & 2 Vict. c. 110, which enacts, that "nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy, for the purposes of this act: provided always, that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such bene-

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fice, for the payment of the debts of such prisoner; and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias*, founded upon any judgment against such prisoner." It will be contended that the provisional assignee is not appointed by any order, and therefore cannot apply for a sequestration under this section, which is limited to the creditors' assignee. It is submitted, however, that it is clear from the various sections of this statute, that it was the intention of the Legislature that the provisional assignee, as well as the creditors' assignee, should be enabled to apply for a sequestration of the profits of a benefice. By section 23, the powers then vested in the Court for Relief of Insolvent Debtors were continued for the purposes therein mentioned. The 24th section continues the existing provisional assignee as provisional assignee under this act. The 35th section prescribes the mode in which a party is to apply to take the benefit of the act; and enacts, that, in his petition, he shall "state that he is willing that all his real and personal estate and effects shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, according to the provisions of this act." The 36th section, for the first time, enables the creditor of a prisoner in execution to apply by petition to the Insolvent Debtors' Court "for an order vesting the real and personal estate and effects of such prisoner in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, according to the provisions of this act." The 37th section applies to the case as well of a creditor as of a prisoner applying, and authorizes the Court for Relief of Insolvent Debtors "to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad," and "all the future estate," &c., "and

all debts due or growing due to such prisoner," &c., "shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England;" "and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee." There therefore must be a vesting order to vest the estate, &c. of any prisoner in the provisional assignee. The 42nd section empowers the provisional assignee to take possession of all the real and personal estate and effects of such prisoner, vested in him by the vesting order, for the purpose of appropriating the same for the benefit of the creditors; for it authorizes him to sell the same, if the Court directs, paying the expenses and accounting for the produce to the Court; and to sue in his own name, if the Court so directs. The 45th section, which gives power to the Insolvent Debtors' Court "to appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act," obviously also contemplates cases in which no creditors' assignee is appointed; for it provides, "that it shall be lawful for the said Court to direct any fee or remuneration for the performance of duties in getting in and distributing the estate of any insolvent debtor, whether by any assignee, or by the provisional assignee, in case of such distribution being effected without the appointment of any other assignee, which shall not exceed," &c. And it appears upon affidavit that in point of fact, in many cases, no creditors' assignee is ever appointed. The language of the subsequent sections, 47, 48, 49, 50, 51 and 53, which confer upon the assignees of an insolvent debtor certain powers, plainly shews that it was the intention of the Legislature to include assignees whether of one character or the other. [*Patteson, J.*—The 51st section would rather seem to apply to the

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creditors' assignee only, as by the 42nd section the provisional assignee must have an order of the Court to entitle him to sue.] To come then to the 55th section, on which this question turns; if the words "such assignee or assignees" do not include the provisional assignee; then the words "assignee or assignees of the estate and effects of any such prisoner," do not include him; and this consequence would arise, that whilst the object of the section is to prevent the assignees' power over the income of a clergyman, it would exclude only creditors' assignees, and not the provisional assignee. It is plain, therefore, that the words "assignee or assignees" include a provisional assignee; and the only difficulty arises from the words "the order appointing an assignee or assignees of such prisoner," &c., "shall be a sufficient warrant for the granting of such sequestration;" but those words, it is submitted, may apply to the vesting order. In *Bishop v. Hatch (a)*, a question arose on the meaning of the 28th section of 7 Geo. 4, c. 57, the language of which is identical with that of the section now under consideration, with the exception that instead of the words "and the order appointing an assignee or assignees of such prisoner" to be found in the later statute, the words "and the order of adjudication made in the matter of such prisoner's petition" are used. And the Court in effect held that the words "assignee or assignees" in the commencement of the section did include a provisional assignee; and, therefore, that an individual judgment creditor might sequester the benefice for his own debt, notwithstanding the assignment to the provisional assignee; if no sequestration had been obtained by the latter in the manner directed by the 28th section. That case is, therefore, an authority against the present application. If, indeed, the Court entertain a doubt about the construction to be put upon the 55th section, they will be influenced in their decision by the consideration that it saves much expense, and that it is

✓ (a) 1 A. & E. 171; S. C. 3 N. & M. 498.

often more desirable that the estate should be administered by the provisional assignee.

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Bovill appeared on behalf of the Bishop of Peterborough, and claimed to have the costs of appearing, whichever way the rule was disposed of.

Sir *F. Thesiger* and *T. Jones*, in support of the rule. Although the term "provisional assignee" may be first used in the 1 Geo. 4, c. 119, the office itself was created by the 53 Geo. 3, c. 6, s. 6. It may be some aid in the construction of the statute now under consideration to see what the former legislation on this subject was; and it will be found, on reference to the 1 Geo. 4, c. 119, and the 7 Geo. 4, c. 57, that the same distinction with respect to the present question is kept up in those statutes between a provisional and a creditor's assignee, as it is submitted, exists in the present statute. By 1 Geo. 4, c. 119, s. 7, when the Court adjudged a prisoner entitled to his discharge, they were bound to appoint a proper person or persons to be "assignee or assignees of the estate and effects of such prisoner," to whom the property of the prisoner, on their acceptance of the appointment, was immediately to be assigned by the provisional assignee; and these assignees were to proceed with all convenient speed to use "their best endeavours to receive and get in the estate and effects of every such prisoner," &c., and to proceed to the sale of his effects; shewing clearly that it was not the intention of the Legislature that the provisional assignee should interfere at all. Then sect. 38 enacts, that it should be lawful for the assignee or assignees "of the estate and effects of such prisoner" "to apply for and obtain a sequestration," &c., "and the order for such discharge should be a sufficient warrant for the granting of such sequestration." The 7 Geo. 4, c. 57, is to the same effect, except that by sect. 28, it enacts, that "the order of adjudication made in the matter of such prisoner's petition," "shall be a sufficient warrant for the granting of such sequestration." It is plain, therefore, that under these

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acts the provisional assignee could not have obtained a sequestration; and if so, the question is, whether the 1 & 2 Vict. c. 110, has made any alteration in this respect, and it is submitted it has not. Wherever a "provisional assignee" is meant to be included in the 1 & 2 Vict. c. 110, he is specially mentioned, and the context shews that he is not to be included under the general term "assignee;" see sects. 35, 42, 45, 47, 51, 53, 55, 56. [*Patteson, J.*—What do you say to the 54th section? Could not the Insolvent Debtors' Court order a transfer of stock, &c., to the provisional assignee?] It is submitted they could not. The words "such assignee or assignees as aforesaid" refer to the creditors' assignees. [*Patteson, J.*—Look at sects. 62 and 63: the latter section must surely include a provisional assignee in the words "such assignee or assignees," although not particularly named, as he is specifically included in the preceding section.] Then the words would only receive that meaning by reference to the 62nd section. [*Patteson, J.*—There is the same difficulty in the 64th section, that a provisional assignee is not mentioned there.] But whatever the construction may be to be put upon other sections of the act, it is clear that a provisional assignee is not within the terms of the 55th section, so as to enable him to issue a sequestration. The case of *Bishop v. Hatch* (a) is said to be an authority that a provisional assignee does come within the words "assignee or assignees," in a similarly worded section in the 7 Geo. 4, c. 57; but that case only decided that a provisional assignee did not become entitled to the profits of a benefice under the statute; and even admitting the authority of that case, it only shews that a provisional assignee is not entitled to the profits of a benefice under the general words of the act, but does not decide that he may apply for a sequestration. It is indeed immaterial for the purposes of this argument, to consider whether a provisional assignee is or is not included in the first part of the 55th section; for the section expressly

✓ (a) 1 A. & E. 171; S. C. 3 N. & M. 498.

enacts, that "the order appointing an assignee or assignees" shall be the warrant for granting the sequestration; and this the provisional assignee cannot possess. The vesting order cannot be considered "the order appointing an assignee." To make an appointment there must be a selection. The 46th section shews that these orders are quite distinct. As to the argument that less expense would be incurred by allowing the provisional assignee to act, the same remark would apply to the appointment of creditors' assignees in every case.

With respect to the application of the bishop for costs, if the provisional assignee was not entitled to apply for this sequestration, the bishop ought not to have issued it; and having done so, he has neglected his duty, and is not entitled to costs.

Cur. adv. vult.

In Michaelmas Vacation, the following judgment was delivered by Lord *Denman*, C. J., for

PATTESON, J.—I had much doubt as to the proper construction of the 55th section of the statute 1 & 2 Vict. c. 110, on which this case depends; however, on the fullest consideration I can give the case, I am of opinion that the vesting order, as it is usually called, is an "order appointing an assignee" of the prisoner, in pursuance of the act, within the meaning of the 55th section.

The object of that section is to prevent the income of a clergyman from being taken at once by a person over whom the ecclesiastical ordinary has no authority, so as to provide for the due performance of the services of the church, in which all parishioners are interested; and it is therefore provided that nothing in the act contained shall entitle the assignee to the income of a clergyman; provided always, that it shall be lawful for such assignee to obtain a sequestration, "and the order appointing an assignee or assignees of such prisoner, in pursuance of this act, shall be a sufficient warrant for the granting of such sequestration."

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It is remarkable that this is the only section throughout the act in which the words "order appointing an assignee" are to be found.

The vesting the estate of the prisoner in the provisional assignee is to be by order, and that order cannot be directed to any other person, so that there is no selection by the Court, and in some sense no *appointment* of the person to be assignee; but still the provisional assignee is not assignee at all of any individual prisoner, until an order of the Court vesting the effects of such prisoner in him is made; the vesting order, therefore, does in some sense *appoint* the provisional assignee to be assignee of the prisoner in respect of whose effects it is made. The 45th section empowers the Court, but does not require it, to appoint a general assignee or assignees; and provides, that when the appointment has been made and accepted, the effects of the prisoner shall by virtue of such an appointment vest in the said assignee or assignees, without conveyance from the provisional assignee. This section does not direct the appointment to be by order of the Court. It is remarkable that wheresoever in the act that appointment is referred to, the word "appointment" only is used, and not the words "order of appointment," or "order appointing," except only in the 55th section, which is in question.

The distinction between an "order" and an "appointment" is only marked in the 46th section.

It is true different powers are given to the provisional assignee and the general assignees by the different sections, and that for the most part the words "provisional assignee" are used when that officer is intended, and the word "assignee" only when the general assignee is intended: yet this is not invariably so; for both are manifestly included in the word "assignee" in several sections, see sects. 49, 62, 63, and others; whereas, in other sections, the words "provisional or other assignee" are used.

Other comments on the one side and the other might easily be made on the words of the different sections of this

act. I do not rely on such arguments, though I have anxiously examined the language of the act, to see if it were possible to draw any conclusive argument from it.

The argument which weighs with me is this, that the main scope and object of the act is to divide the insolvent's property rateably among his creditors; and that this object will best be effectuated by such a construction of the 55th and other sections, as will not give an opportunity for any particular creditor to intervene and obtain a preference over others. I see nothing in that section indicating any pretension to distinguish between the provisional and general assignee, and I see no sort of reason for such distinction; the words of the section are large enough to include both, and the particular object of the section is quite beside any such distinction.

Upon the whole, I am of opinion that the vesting order is an "order appointing an assignee" of such prisoner; and that this rule must be discharged, with costs to the provisional assignee and the bishop.

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Rule discharged accordingly.

BROWNE v. BURTON.

THIS was a rule calling upon the plaintiff to shew cause why the warrant of attorney herein and all subsequent proceedings, should not be set aside.

It appeared from the affidavits, that a warrant of attorney, bearing date the 24th of February, 1847, and which was

A deed or other writing must be taken to speak from the time of its execution, and not from the date apparent on the face of it.

Therefore, where a warrant of attorney, under seal, bore date the 24th of February, 1847, but was not executed till the 20th of March, or delivered over to the plaintiff until the 29th of March, and the defeasance was for the payment of the principal sum "on the 20th of March next;" and the plaintiff issued execution on the 30th of March; it was held that the execution was premature, and must be set aside.

Upon motion to set aside a warrant of attorney, the Court will not determine, upon affidavit, the question of whether or not it has been given by way of fraudulent preference.

An execution for more than the sum really due, but not for more than the sum authorized by the warrant of attorney, will only be set aside pro tanto for the excess.

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under seal, and contained a release of errors, was executed by the defendant on the 20th of March in that year. The defeazance, which bore date the same day as the warrant, was as follows. "Memorandum. The within warrant of attorney is given to secure the payment from the within named John Burton to the within named George Browne of the sum of 285*l*. on the 20th day of March next, with lawful interest for the same from the date hereof; and it is hereby agreed by and between the said parties, that no action, execution, or other process or proceedings, shall be commenced, sued out, and prosecuted against the said John Burton, his heirs, executors, or administrators, or against his or their lands, goods, or chattels, upon the judgment to be entered up in pursuance of the within warrant, until default shall happen to be made in payment of the sum above mentioned, and interest for the same as aforesaid; but if default shall be made in payment of the said sum, the said George Browne shall be at liberty to issue execution for the whole amount of principal and interest remaining unpaid, besides costs of judgment and execution, sheriff's poundage, officers' fees, and other incidental expenses." The warrant of attorney, after being executed by the defendant, was not delivered by him to the plaintiff till the 29th of March. On the 30th of March, the plaintiff entered up judgment on it, and execution was forthwith issued for the said sum of 285*l*. The defendant subsequently became a bankrupt, and the present rule was then obtained on behalf of his assignees, on the grounds, first, that the execution had issued too soon; secondly, that, according to the facts deposed to in the affidavits, execution had issued for too much; and thirdly, that, according to those facts, the warrant of attorney had been given voluntarily and by way of fraudulent preference.

Barstow shewed cause. As to the first objection, it is true that in some of the old cases, a deed is said to take effect from the execution only, and not from the date; but the

Court will be going further, if it extend that construction to warrants of attorney also, which, although in writing, need not be by deed. The only question here is as to the intention of the parties, and there can be no doubt that the execution has been issued in conformity with that intention. The warrant of attorney is dated the 24th February, 1847, and authorizes execution to be issued on default of the payment of the principal, "on the 20th day of March next." That clearly means the 20th of March, 1847; and the circumstance that the defendant did not in point of fact execute the warrant till that day, cannot alter the date when the execution was to issue. The defendant may be supposed, on the 20th of March, to have repeated the whole of the warrant. Unless, therefore, there be some express authority on the subject, the Court will not interfere to set aside this execution, which it sees is within the intention of the parties. As to the execution having been issued for too much, it is conceded that that is so; but that is only a ground for setting aside the execution pro tanto. He referred to *Williams v. Waring* (a), and *Evans v. Pugh* (b). With respect to the last ground, the Court will not try the question of whether this warrant of attorney was given by way of fraudulent preference, on affidavit.

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Prideaux, in support of the rule. The word "next" relates to the day of the execution of the instrument, and not to the day on which it purports to bear date; *Clayton's case* (c); *Osley v. Sir Baptist Hicks* (d); *Hall v. Cazenove* (e); *Steele v. Mart* (f); *Anon.* (g). And even were this instrument not under seal, as it is; and, as it contains a release of errors, as it was necessary it should be; the same rule, it

(a) 2 Cr., M. & R. 354; S. C. 4 Dowl. 200.

✓(b) 2 Dowl. 360.

(c) 5 Rep. 1.

✓(d) Cro. Jac. 263.

✓(e) 4 East, 477; S. C. 1 Smith, 272.

✓(f) 4 B. & C. 272; S. C. 6 D. & R. 392.

(g) 3 Salk. 120.

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is submitted, would apply. As to the second point, *Tilby v. West* (a) is an authority that the execution should be set aside in toto. He also referred to *M' Cormack v. Melton* (b). He proceeded to argue that it was sufficiently shewn upon the affidavits that the warrant was given by way of fraudulent preference.

PATTESON, J.—I shall not determine the question whether this warrant was given by way of fraudulent preference or not, on a motion to set it aside.

Cur. adv. vult.

In Michaelmas Vacation, the following judgment was delivered by Lord *Denman*, C. J., for

PATTESON, J.—One of the objections in this case was, that the execution was issued too soon. That the defeazance stating the warrant of the attorney to be for securing the payment of 285*l.* “on the 20th day of March *next*, with lawful interest for the same from the date hereof,” and the warrant of attorney being executed on the 20th of March, 1847, the principal money was not payable till the 20th March, 1848.

If the warrant of attorney had on the face of it borne date 20th of March, 1847, that would undoubtedly have been so; and the question is, whether the circumstance of the date, apparent on the face of the instrument, being the 24th of February, 1847, makes any difference.

Now, the rule uniformly acted upon from the time of *Clayton's case* (c) to the present day is, that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date is indeed to be taken *prima facie* as the true

✓(a) 16 East, 163.

3 N. & M. 881.

✓(b) 1 A. & E. 331; S. C.

✓(c) 5 Rep. 1.

time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded. *Steele v. Mart* (a) is precisely in point.

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It is to be observed that by the language of the defeazance, the principal was not to be paid on the very day of the execution of the instrument; for it provides for payment of interest from the date thereof.

Neither was this warrant of attorney, although executed on the 20th March, delivered to the plaintiff until the 29th; nine days after the time when it is contended the principal secured by it had become due.

Upon the whole I am of opinion that the rule of law is clear, that the 20th of March mentioned in the defeazance, must be taken to be the 20th of March, 1848, whatever may have been the intention of the parties; and that the execution being premature, the rule to set it aside must be made absolute; but not to set aside either the warrant of attorney itself, or the judgment; and without costs, because the rule asks for too much.

I am of opinion that I cannot enter into the question of fraudulent preference; and that as to the excess in the execution, if good at all, the execution would only be set aside pro tanto.

Rule accordingly.

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Where an attorney had omitted to take out a certificate for upwards of ten years, and had given the notices required in order to take it out at the end of the Term, pursuant to Reg. Gen., Easter Term, 9 Vict.; the Court refused, although special grounds were stated for the application, to allow him, on the first day of the Term, to take out his certificate forthwith.

Ex parte BARNES.

UNTHANK moved (a) that a gentleman of the name of Barnes, who had been admitted as an attorney, might be permitted to take out his certificate forthwith, without waiting till the last day of the present Term. It appeared upon the affidavit, that Mr. Barnes was admitted as an attorney in 1836, and had taken out his certificate for that year, but had not done so since, nor had he practised as an attorney since that time. He had given the requisite notices under Reg. Gen., Easter Term, 9 Vict. (b), of his intention to apply for permission to take out his certificate at the end of the present Term. The ground upon which this application was made was, that Mr. Barnes had had an advantageous offer of partnership made to him, which it was of great importance that he should at once enter into. [*Patteson, J.*—I do not know that I have any power to make this order. The object of the Reg. Gen., Easter Term, 9 Vict., is, that where an attorney has omitted to renew his certificate for a whole year, he should give certain notices, in order to afford an opportunity for inquiry into his conduct and employment during the interval. Were I to grant this motion, I should be doing away with the very object which the rule seeks to attain.] In *Ex parte Blunt* (c), the Court, under special circumstances, allowed the name of a person applying for admission as an attorney to be introduced into the Master's list on the first day of Term; although the notices had not been given "three days at the least before the commencement of the Term," pursuant to Reg. Gen., Hilary Term, 6 Wm. 4, r. 5. [*Patteson, J.*—There an opportunity was afforded of making some inquiry.] In *Ex parte French* (d), the Court under particular circum-

(a) On the first day of the Term. ✓(c) 5 Dowl. 231.

(d) Ibid. p. 374.

✓ (b) *Ante*, vol. 3, p. 840.

stances re-admitted an attorney without the usual notices. [Patteson, J.—In that case he had given the notices, and a rule for his re-admission had been obtained, which had only not been acted upon in consequence of his ill health.] There is a case of *Ex parte Weymouth* (a) in this Court last Term, not yet reported, where the Court, under special circumstances, dispensed with the notices required by Reg. Gen., Easter Term, 9 Vict.

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PATTESON, J.—I will make inquiry into the circumstances of the case last cited.

Cur. adv. vult.

On a subsequent day,

PATTESON, J.—I find that in the case cited of *Ex parte Weymouth* (a), a year and a month had elapsed since the admission of the attorney, who had never taken out a certificate at all. There, therefore, a month only had elapsed since the time within which the attorney might have taken out his certificate without any notice at all. That case scarcely militates against the object of the rule. But here upwards of ten years have passed without the certificate being renewed; and the very object with which the rule was framed, would be defeated, were I to grant this application.

Motion refused.

✓(a) Since reported, *ante*, p. 60.

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PARKER v. BAYLEY.

Where upon the hearing of an insolvent prisoner's petition, who had obtained an interim order for protection from arrest, under 7 & 8 Vict. c. 96, the commissioner, under sect. 24, refused a day for his final order, on the ground of fraud, in contracting a debt; but did not remand him to his former custody, as authorized by that section: *Held*, that, the time limited for his protection by the interim order having expired, the plaintiff, one of his detaining creditors, might, under the 6th section, issue a fresh writ of ca. sa., and arrest him under it. And that no scire facias was necessary to revive the judgment. *Quere*, if such writ should recite the circumstances under which it issues.

THIS was a rule calling upon the plaintiff to shew cause why the writ of *capias ad satisfaciendum*, upon which the defendant is now detained in the custody of the keeper of the Queen's Prison, should not be set aside for irregularity, with costs; and why the defendant should not be discharged out of the custody of the said keeper of the Queen's Prison as to this action.

The affidavits in support of the rule, which were made by the defendant and his attorney's clerk, stated that the defendant was arrested on or about the 27th day of June, 1844, at the suit of the plaintiff, on a writ of *capias ad satisfaciendum*, for the sum of 43*l.* 13*s.*, and soon after such arrest was removed to the Queen's Prison, and detained there in custody upon that writ. That on or about the 9th of September in the same year, he filed his petition in the Court of Bankruptcy, under the acts 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, that his estate might be administered under the said acts, in the schedule to which petition was inserted an account of the debt and costs of the above named plaintiff. That an interim order was made for his protection from arrest, under sect. 6 of the latter statute; and that he was thereupon discharged out of custody. That on the 16th of October, 1844, he went up before the Court of Bankruptcy in Basinghall Street, in the city of London, to be heard and examined under the said acts, touching and concerning the debts contained in the said schedule; and that on the morning of, and a short time previous to such hearing, the following agreement was entered into between the defendant and the parties whose signatures are thereto affixed.

If it does not, it is an irregularity merely, and may be waived by lapse of time.

Where the defendant was arrested on the 28th of August, and the application was made to set aside the writ on the 6th of November, without explanation of the delay upon the defendant's affidavits; and it appeared upon the affidavits in opposition to the rule that two similar applications had already been made by him to a Judge at Chambers, and refused; *Held* too late,

An agreement made this fifteenth day of October, 1844, between Frederick William Naylor Bayley, of No. 198, Strand, in the county of Middlesex, author and editor of Newspapers of the one part, and several other persons whose names are hereunto affixed, being creditors of the said Frederick William Naylor Bayley, of the other part.

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Whereas the said Frederick William Naylor Bayley, being indebted unto several persons, and at present unable to pay the same, did, on the ninth day of September last, file his petition and schedule in the Court of Bankruptcy; and the sixteenth day of October instant is appointed for the first examination of the said Frederick William Naylor Bayley, pursuant to his interim order for protection from process, in respect of the debts contained in his said schedule.

And whereas the said Frederick William Naylor Bayley, being very desirous of paying to his said several creditors full twenty shillings in the pound upon the fair and bonâ fide amount of their respective demands, the same to be severally investigated and adjudicated upon in the said Court of Bankruptcy, or such of them as may be disputed, hath proposed and hereby proposes, covenants and agrees to and with the said several creditors, parties executing the same, that he the said Frederick William Naylor Bayley, shall and will pay into the hands of the official assignee nominated and appointed to act in the matter of the said petition and schedule of the said Frederick William Naylor Bayley, the weekly sum of five pounds in each week during the first six calendar months of the ensuing year; the first of such weekly sums to be paid on Monday the sixth day of January next, and thence on every succeeding Monday during that and the succeeding months until the end of June inclusive; and then the weekly sum of ten pounds in each and every succeeding week, commencing on the first Monday in July next; and shall and will continue such weekly payments until the whole of the creditors of the

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said Frederick William Naylor Bayley, whose names or debts are mentioned or described in the said schedule, shall be fully paid and satisfied in manner aforesaid.

In consideration of the said proposal, and covenant and agreement of the said Frederick William Naylor Bayley, to perform and keep the same, we, the creditors of the said Frederick William Naylor Bayley, whose names are hereto affixed, do severally and respectively, and as our several and respective act and agreement, testify and declare our consent to this proposal and agreement; and that we will, when so requested, sign, seal, and execute unto the said Frederick William Naylor Bayley, any further act or document that may be considered requisite for the carrying into permanent effect the aforesaid arrangement.

As witness our hands, &c.

Then followed the names of certain creditors, amongst whom was the plaintiff's name, signed for him by his attorney.

That the attorney for the plaintiff signed the agreement on behalf of the plaintiff, agreeing to accept the composition therein named, and consented at the same time not to oppose the defendant's discharge on the hearing of the petition. That on the defendant being heard on his petition, he was opposed by a creditor of the name of Smith, (who was not a detaining creditor), and his petition was dismissed. That in consequence of the whole of the defendant's detaining creditors having signed and accepted the said agreement as a new security for payment of their respective claims, the defendant became thereby finally discharged from custody. That the learned commissioner, on being applied to by one of the non-detaining creditors to have the defendant remanded to custody, observed that he had no further power over him, as he had settled with his detaining creditors. That on the 22nd of April, 1845, the plaintiff issued a new writ of *capias ad satisfaciendum*, (of which a copy was annexed to the affidavit, as well as of

the first writ, and which were both in the ordinary form), on which the defendant was arrested on the 28th of August, 1847, and from the custody under which he now sought to be discharged. That search had been made in the proper office, and no scire facias or process to revive the judgment, or to recover judgment upon the new security given by the defendant to his detaining creditors, had been sued out by the plaintiff.

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The affidavit in answer to this rule gave the following account of the agreement being entered into. That the plaintiff's attorney was induced, on the entreaties of the defendant, and on the assurance that the whole of his creditors would consent, and that the learned commissioner in bankruptcy, before whom the same was to be heard, would make an order according to the terms of the agreement, and that the defendant would pay within a week a sum of 12*l.*, which had been incurred as costs in opposing a former unsuccessful application by the defendant to be discharged out of custody, to sign the agreement. But that it was not signed by the defendant, nor was it stamped, and was not intended to be binding on the parties signing the same, but merely as an expression of their consent to the terms thereof, provided the said learned commissioner should think fit to make an order upon the defendant to the effect thereof. It was expressly denied that the defendant was discharged from the custody of the keeper of the Queen's Prison by the consent of the plaintiff or his attorney, or that he was finally discharged therefrom on the 16th of October, 1844, inasmuch as he was not then in custody. The affidavits spoke in equally loose language, as those in support of the rule, of the petition having been "dismissed" by the commissioner; but there was an extract given of the order made by Mr. Commissioner *Fane* on the 16th of October, indorsed on the schedule filed in the matter of the defendant's petition, which was as follows: "Petition ~~dismissed~~, Mr. Smith's debt being contracted in fraud, day refused for final order." That the word "dismissed" had been struck out, but by whom was not known, although inquiry

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had been made at the Court of Bankruptcy. That repeated applications had been made, since the order, to the defendant for payment of the plaintiff's debt, without avail. That the time limited by the interim order for protection having expired, the plaintiff's attorney afterwards issued a fresh writ of *capias ad satisfaciendum*, the previous writ not being in the hands of the sheriff, being sent with the *habeas corpus* when the defendant caused himself to be removed to the Queen's Prison. That owing to the defendant's keeping out of the way, he could not be arrested till the 28th of August, 1847. That on the 9th of September following, the defendant caused a summons to be served in this action, "to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex as to this action, for irregularity; the defendant having been previously taken in execution for the same debt and discharged, by consent of the plaintiff's attorney, out of the custody of the keeper of the Queen's Bench Prison; and why the plaintiff should not pay the costs of the application." That this summons was supported by affidavits similar to those now used, and was heard before a learned Judge, who after hearing counsel on both sides, refused the application. That on the 16th of September, another summons was taken out, calling on the plaintiff "to shew cause why the writ of *ca. sa.* herein should not be set aside for irregularity, with costs to be taxed; and why the defendant should not be discharged out of the custody of the sheriff of Middlesex as to this action; he having been arrested in the year 1844, and confined to the Queen's Bench Prison for the same debt upon which he is now detained in custody of the said sheriff of Middlesex, and having been discharged from the former custody by reason of an interim order of Mr. Commissioner *Fane*, after the filing of the defendant's schedule, and the plaintiff's attorney having a new security for the said debt." This summons, upon hearing before the same learned Judge, was also dismissed. The present rule was obtained on the 6th of November.

Bovill shewed cause. The agreement in this case was nothing more than a declaration on the part of the defendant and some of the other creditors, that when the insolvent came up before the commissioner, they were willing to take a composition if the commissioner would sanction the arrangement. It was not signed by the defendant, and, therefore, not binding on him; nor is it a deed, nor is there any covenant on the part of the defendant. It was incapable of being carried out, for there was no official assignee appointed, into whose hands the money could be paid. [*Patteson, J.*—I see no difficulty in that, for if the agreement was to receive the sanction of the Court, the official assignee might have consented to receive it.] It is clear upon the affidavits, that the petition was not dismissed on the ground of an arrangement having been come to between the insolvent and his creditors; but on the ground of a particular creditor's debt having been fraudulently contracted; in which case, under the 24th section of 7 & 8 Vict. c. 96, the commissioner had no power either to grant a final order, or to renew the interim one. Under that section the commissioner might have remanded the insolvent to his former custody; but as he did not do so, the plaintiff was entitled to proceed under the 6th section, which enacts, "that after the time allowed by any such interim order, or any renewal thereof (as the case may be) shall have elapsed, such petitioner shall not, by such discharge, be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect, notwithstanding such discharge." The only way in which he could proceed under that section was by issuing a fresh writ. An alias writ could not issue; as the return to the former writ would have been "*cepi corpus*." It is said that a *scire facias* was requisite, but here execution has issued within a year and a day from the date of the judgment. It is not necessary that the writ should state the special circumstances under which it issued; but if it be, the omission is a mere irregularity, and may

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be cured by lapse of time. Here the arrest was on the 28th of August, and the defendant does not shew why he did not apply before. Where it is sought to set aside proceedings on the ground of irregularity, the party applying must shew on the face of his affidavits why he has delayed coming to the Court, and it is not sufficient if the cause appears aliunde; *Goren v. Tute (a)*. It appears upon the plaintiff's affidavits, that in point of fact an application similar to the present was made to a learned Judge at Chambers and refused; and that a second application by way of appeal against his decision was made to the same learned Judge, and also refused. The defendant is therefore bound by the decision of the learned Judge, and cannot make this further appeal to the Court; *Thompson v. Beche (b)*; *Joyne v. Collinson (c)*.

Charnock, in support of the rule. It is submitted that it appears sufficiently upon the affidavits that the commissioner refused to make any order, because the creditors had come to an arrangement with the insolvent to accept of a composition for their respective debts. Even if not binding on the defendant, it was entered into voluntarily by the plaintiff, and, therefore, binding on him. But at any rate, the plaintiff had no right to issue a fresh writ of *ca. sa.*, the other one being still in the hands of the sheriff. For this consequence would follow, that the defendant might be detained on both writs for the same debt. The proper course for the plaintiff to have pursued was to have applied to the commissioner to remand the defendant into his former custody, as was done in the case of *Ex parte Partington (d)*. And if instead of doing so, he chose to

✓(a) 7 M. & W. 142; S. C. 8 Dowl. 868.

✓(b) 4 Q. B. 759; S. C. 1 D. & M. 49. See *In re Stretton*, ante, vol. 3, p. 278; and *Chapman v. King and Another*, ante, vol. 4, p. 311.

(c) *Ante*, vol. 2, p. 449; S. C. 13 M. & W. 588.

✓(d) *Ante*, vol. 2, p. 650; S. C. 13 M. & W. 679. See this case in the Court of Queen's Bench, 6 Q. B. 649.

proceed under the 6th section, he should have recited in the writ the circumstances under which it issued. The omission to do so is more than an irregularity; but, if not, it is submitted that the defendant has come within sufficient time in obtaining the present rule within the first four days of the present Term.

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PATTERSON, J.—It seems to me quite clear that the petition of the defendant in this case was not dismissed on the ground of any arrangement having been come to between him and his detaining creditors. If that had been the case, it would have been impossible for the plaintiff to have arrested him a second time; because the principle would apply that a party having taken a security for an old debt, and allowed the defendant to be discharged out of custody in respect of it, cannot arrest him again on the same cause of action; and his remedy, if at all, is by resorting to the security. I apprehend, if after the commissioner had granted an interim order, the parties agreed to take a composition for their debts, upon which the petition was dismissed, the defendant could not be arrested again for those debts, and it would be the same as a discharge by arrangement.

But this, it appears, was merely a proposition to pay by instalments, which was to be laid before the commissioner, and which was only to be binding if he were willing to sanction it. On the rule being moved, I understood it was an agreement binding on both parties; but on examination, I find it was not signed by the defendant, and, therefore, was never binding on him at all. The commissioner did not act upon this arrangement; and the word "dismissed" which had been written on the back of the schedule, probably in expectation of this arrangement being made, was struck out; and instead thereof the words "day refused for final order," are inserted at the end; and the ground is stated, namely, that an opposing creditor's debt had been contracted fraudulently. Under the 24th section

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of the 7 & 8 Vict. c. 96, the commissioner has no power, where he is of opinion that any debt of the petitioner has been contracted "by any manner of fraud or breach of trust," to name any day for making a final order, or to renew the interim order. It however expressly empowers him to remand the petitioner back to his former custody. This, however, the commissioner does not appear to have done.

There is, however, another section, the sixth, which gives the authority to the commissioner to grant the interim order; and which enacts, "that after the time allowed by any such interim order, or any renewal thereof (as the case may be) shall have elapsed, such petitioner shall not, by such discharge, be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge." It is said, indeed, that this section does not give any form of writ, or point out any mode of proceeding; but the Court will give effect to the terms of the statute, and there must be some mode by which its enactments shall be carried out.

This is something like the case of an escape.* There the plaintiff may take the defendant again by another writ of *capias ad satisfaciendum*, and he has a right to a new writ for that purpose.

It is said the writ should have been an *alias writ*, but the plaintiff could not have an *alias writ* here; for that only issues on the ground that the former writ has not been executed, and here the return to the former writ would be "*cepi corpus*."

Nor can he have a *scire facias* to revive the judgment, for that is only required where no execution has issued on the judgment for upwards of a year and a day; but here execution did issue within that time (a).

/(a) See *Franklin v. Hodgkinson*, *ante*, vol. 3, p. 554. (Note by reporters).

Then it is said, that the *ca. sa.* should have recited the special circumstances under which it issued. But even if that were so, that would only be matter of irregularity; and then the defendant should have shewn, on moving for this rule, why he has delayed so long in making the application. He has not, however, done so; but the affidavits in opposition to the rule shew that he made two applications for the same purpose, to a Judge at Chambers, which were refused. Under these circumstances I think he cannot now take advantage of a mere irregularity.

It seems to me, that under the 24th section, two courses were open. Either the commissioner might remand the petitioner into his former custody; or, if no such remand were made, the plaintiff might, under the 6th section, proceed again to arrest him under a fresh writ of *ca. sa.*

I observe, that although under section 24 the commissioner cannot, in a case within it, renew the interim order, or name a day for granting the final order; yet, by the 28th section, he is empowered at any time afterwards, if he shall see fit, to grant an order for protection: so that for ought that here appears, the commissioner may yet make an order for protection in this case.

Therefore, on the ground that the plaintiff was entitled under the 6th section to issue this writ; and that if there is any irregularity in the writ, it is too late now to take advantage of it; I am of opinion this rule must be discharged; and, as it is an appeal from the Judge's decision at Chambers, with costs.

The case of *Ex parte Partington (a)*, which was also before this Court (*b*) on a somewhat similar application, shews that the commissioner has power to remand, independently of the 24th section.

Rule discharged, with costs.

- ✓ (*a*) *Ante*, vol. 2, p. 650; S. C. 13 M. & W. 679.
✓ (*b*) 6 Q. B. 649.

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WOOLMER v. COLLINS.

On a motion for judgment as in case of a nonsuit, the affidavit stated "that no notice of trial had been given in this cause," without negating that a trial had in point of fact been had: *Held* sufficient.

J. Park R. 736

THIS was a rule for judgment as in case of a nonsuit. The affidavit in support of the rule stated that issue was joined on a certain day, and "that no notice of trial has been given in this cause."

Meymott shewed cause, and objected that the affidavit should have stated positively that no trial had taken place. It is consistent with this affidavit that the defendant has dispensed with a notice being given, and that a trial has actually been had. The Court will not presume that the plaintiff has not proceeded to trial.

PATTESON, J.—The Master (*a*) informs me that this form of affidavit is commonly used. I cannot presume that the plaintiff has proceeded otherwise than according to the ordinary practice, which is, that he should give a notice of trial before he proceeds to trial. The affidavit shews that no such notice has been given, and I must therefore conclude that he has not proceeded to trial.

Meymott then shewed cause on the merits.

Ball, in support of the rule.

Rule discharged, on peremptory undertaking.

(*a*) Master Bunce.

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LEVY v. DREW.

THIS was a rule calling upon the plaintiff to shew cause why the interlocutory judgment signed herein should not be set aside.

It appeared upon affidavit, that the declaration in this case having been demurred to, the plaintiff applied to a learned Judge at Chambers, on the 12th August, 1847, to set aside the demurrer as frivolous. This application was refused; but the learned Judge made an order that, upon payment of costs, the plaintiff should be at liberty to amend the declaration. The plaintiff not having amended, the defendant signed judgment of non pros on the 14th of August. That judgment was set aside by Mr. Baron Platt, on the 20th of the same month, with costs. The plaintiff taxed the costs of setting aside the judgment of non pros, on the 24th, at 3*l*. 11*s*. 6*d*.; and the defendant taxed the costs of the demurrer and leave to amend, on the 26th of August, at 6*l*. 19*s*. 6*d*. On the latter day, a clerk of the plaintiff's attorney called at the office of the defendant's attorney, and explained to a clerk there that the allocatur for the defendant's costs was by mistake given for 4*s*. too much, the true amount being 6*l*. 15*s*. 6*d*. He then tendered a receipt for the plaintiff's costs of setting aside the judgment of non pros, and the sum of 3*l*. 4*s*., as the balance due to the defendant after deducting those costs, and the sum of 4*s*. so incorrectly included in the allocatur. The clerk of the defendant's attorney said his master was out, and he had no authority to receive it. The clerk of the plaintiff's attorney then left a copy of the amended declaration and said, that if the defendant's attorney would send to the plaintiff's attorney's office, that he should receive the

Where an order for leave to amend is "upon payment of costs," the payment of those costs is a condition precedent.

Therefore, where, after demurrer, an order was made, that, upon payment of costs, the plaintiff should be at liberty to amend his declaration; and the plaintiff did amend, and delivered his amended declaration; but did not tender the amount of the costs as ascertained by the Master's allocatur: Held, that an interlocutory judgment, signed by him for want of a plea, was irregular.

Where an order for leave to amend is made upon payment of costs, and the costs are taxed and ascertained by the Master's allocatur, the party, in order to avail himself of the leave to amend,

must tender the full amount of the allocatur, and not a less sum; although he may be prepared to shew that a mistake has been made in allowing certain items.

Semble, that a party may set-off interlocutory costs in an action, without an order of the Court or a Judge.

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balance so offered. The amended declaration so left was not returned, nor was any application made for the costs. On the 30th of October, the plaintiff signed the interlocutory judgment for want of a plea, which it was now sought to set aside.

Hoggins shewed cause. The plaintiff was entitled to deduct his own costs of setting aside the judgment of non pros, in tendering the balance, without an order of the Court or a Judge for that purpose. By Reg. Gen., Hilary Term, 2 Wm. 4, c. 93, it is ordered, "that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." It cannot be necessary, therefore, that an order of the Court or of a Judge for this purpose should be obtained; and the practice is understood to be in conformity with this view. He was also entitled to deduct the 4*s.* too much which had been clearly included in the allocatur by mistake. But should the Court be against the plaintiff on these two points, then it is submitted, that the plaintiff was not bound to tender the costs before delivering an amended declaration. The order authorized the amendment of the declaration, and if the plaintiff did not obey that part of it which imposed costs upon him, the defendant had the same remedy for their recovery as in other cases.

Prentice, in support of the rule. It is submitted that the plaintiff had no right to deduct his costs without having first obtained an order of the Court or a Judge for that purpose. At any rate, he could not deduct the 4*s.* alleged to have been wrongly included in the allocatur of the defendant's costs. The tender, therefore, was not sufficient. The plaintiff, however, having obtained the leave to amend upon payment of costs, the payment was a condition precedent,

before he could deliver an amended declaration or proceed further in the action; *Nichols v. Bozon* (a). The plaintiff, therefore, was not in a position to sign the present interlocutory judgment, which must be set aside for irregularity.

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PATTESON, J.—I am of opinion that the order of amendment here being upon payment of costs, made the payment of those costs a condition precedent. The question then arises, was the tender a sufficient one? It is said, that the plaintiff had no right to deduct from the amount of the costs due from him to the defendant, the amount of interlocutory costs due from the latter to him, without an order of the Court or a Judge for that purpose. Now the rule of Court certainly says, that interlocutory costs awarded to the adverse party may be deducted; and as there is no authority to shew that it is necessary to come to the Court or a Judge for an order to be at liberty to deduct them, I should be loath to hold, in the absence of any authority, that such an order was necessary, particularly as it might be productive of great inconvenience. But it is not necessary that I should decide this point, because I do not see, even then, that the plaintiff tendered the proper balance. He chose to tender 4s. less, because, he says, that the Master had made a mistake in his allocatur, by allowing that sum too much to the defendant; but if he could do this, he might have deducted 10*l.*, or any other sum. The allocatur for this purpose must be considered conclusive as to the amount, and if the plaintiff questioned its correctness, he should have made the application in the proper quarter to have it set right; but he could not tender less than the amount for which it was given, merely because he says that less ought to have been allowed.

I, therefore, think the interlocutory judgment was irregular, and the rule for setting it aside must be made absolute.

Rule absolute.

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In re arbitration between SPOONER and PAYNE.

*J. C. 11-213-186**(In the full Court.)*

Where a rule of Court for payment of money is more than a year and a day old, it is not necessary to sue out a scire facias, or to obtain the leave of the Court, before suing out execution upon it, by virtue of 1 & 2 Vict. c. 110, s. 18.

Therefore, where a rule obtained by a defendant had been discharged with costs, and the costs taxed on the Master's allocatur, and more than a year and a day after the allocatur, the plaintiff issued a ca. sa. upon it: *Held*, on motion to set aside the ca. sa., and to discharge the defendant out of custody, that the proceedings were regular, and that it was not necessary that the plaintiff should have issued a scire facias, or obtained the leave of the Court to issue execution.

THIS was a rule calling upon the plaintiff to shew cause why the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and why the defendant should not be discharged out of the custody of the keeper of the Queen's Prison, as to the execution in this matter.

It appeared that the cause had been referred to arbitration, and an award made, and a rule nisi obtained by the defendant to set aside the award, which rule was afterwards discharged, with costs. That the costs were taxed at 23*l.* 1*s.*, and the Master's allocatur bore date the 7th of February, 1845. On the 17th of November, 1846, the defendant was arrested under a ca. sa. issued under the 1 & 2 Vict. c. 110, s. 18, upon the allocatur. No scire facias had issued to revive the allocatur.

Whitehurst and *Miller* shewed cause. It is submitted it is not necessary to issue a scire facias before proceeding to execution upon an allocatur, although more than a year and a day may have elapsed from its date. It is true a judgment must be revived by scire facias after the expiration of that time, but that is because judgments are of record; whereas a rule or order of Court is not a record. Lord *Coke* defines a record as "a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a Court of justice," and says, that they "import in them such incontrollable credit and veritie, as they admit no averment, plea, or prooffe to the contrarie;" *Co. Litt.* 260. The 1 & 2 Vict. c. 110, s. 18, however, it is said, enacts, that they shall have "the effect of judgments;" but that does not make them in

all respects similar to judgments; *Farmer v. Mottram* (a); or require that they should be entered of record; *Cetti v. Bartlett* (b). It has never been the practice to issue a scire facias in such cases. But even supposing it were necessary, the ca. sa. is not absolutely void, because no scire facias has issued; *Blanchenay v. Burt* (c). The defendant ought to be left to his writ of error. At any rate the present application is too late. They referred also to *Mortimer v. Piggot* (d); *Sandon v. Proctor* (e), and *Benn v. Greatwood* (f).

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Manning, Serjt., in support of the rule. The 1 & 2 Vict. c. 110, s. 18, in giving to rules and orders of Court the same effect as judgments, manifestly intended to put them on the same footing in all respects. They are so treated in fact when an execution issues at once without any judgment being signed; and there would seem to be the same reason why a scire facias should issue on a rule or order of Court for payment of money more than a year and a day old, as on a judgment. It is said that it has not been the practice to issue a scire facias on orders or rules of Court after the lapse of a year and a day from their date; but in so short a time as has elapsed since the passing of the 1 & 2 Vict. c. 110, it can hardly be said that any settled practice is established. In cases of attachment for nonpayment of money under an award, after four Terms have elapsed, a rule nisi only is granted; and in moving for it, an affidavit is necessary that the money remains unpaid. The case of *Blanchenay v. Burt* was an action of trespass against the parties executing a writ of ca. sa. issued more than a year and a day after the judgment, without a scire facias. It is

✓(a) 6 M. & G. 684; S. C. 7 & D. 613.

Scott, N. R. 408; *ante*, vol. 1, ✓(d) 4 A. & E. 363, n.; S. C. p. 781. 2 Dowl. 615.

✓(b) 9 M. & W. 840; S. C. 1 ✓(e) 7 B. & C. 800.

Dowl. 928, N. S. (f) 6 Scott, 891.

✓(c) 4 Q. B. 707; S. C. 3 G.

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no authority that, upon an application like the present, the writ would not be set aside, and the party discharged out of custody. If this had been the case of a ca. sa. issuing more than a year and a day after judgment signed without a scire facias, it would have been a void execution; *Russell's case* (a); or, at any rate, ground of error; *Patrick v. Johnston* (b). Here error will not lie, but this application is in the nature of error. If the Court should think a scire facias was not requisite, at any rate the leave of the Court to issue execution should have been obtained. He referred also to *Reynolds v. Newton* (c); *Parsons v. Loyd* (d); *Goodtitle d. Murrell v. Badtittle* (e); *Hodson v. Warrington* (f), and the cases collected in 2 *Chit. Arch. Pr.* 1013, 8th ed.

Lord DENMAN, C. J.—We do not see the necessity of a scire facias in a case like the present; but it is desirable to inquire what is the practice of the other Courts in this respect.

Cur. adv. vult.

On a subsequent day,

Lord DENMAN, C. J., delivered the judgment of the Court.—The defendant in this case obtained a rule for discharging him from imprisonment under a ca. sa., because it had issued, on a rule of Court requiring him to pay money, under the 1 & 2 Vict. c. 110, s. 18, without a scire facias or special leave of the Court.

We are of opinion that no scire facias or special leave is made necessary by that act, or by any legal principle: and we learn, that according to the practice now existing, the proceedings are regular. The rule must, therefore, be discharged.

Rule discharged.

(a) 4 Leon. 197.

(d) 3 Wils. 341.

(b) 3 Lev. 403.

(e) 9 Dowl. 1009.

✓(c) 1 Q. B. 525; S. C. 1 G.
& D. 153.

(f) 3 P. Wms. 36.

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SAYER v. DUFAUR.

(In the full Court.)

INDEBITATUS assumpsit in 500*l.*, for the wages or salary of the plaintiff before that time, due for work done and performed as the hired servant of and for the defendant, and on his retainer, and for other work and labour then done and performed by the plaintiff for the defendant at his request; and in 500*l.* for money paid, &c.; and in 500*l.* for money due on an account stated. To the plaintiff's damage, &c.

And for a further plea as to the said residue of the monies in the declaration mentioned, and as to so much of the declaration as relates to the said residue, the defendant says, that after the accruing of the causes of action as to which this plea is pleaded, and after the passing of an act of Parliament made and passed in the session of Parliament, held in the fifth and sixth years of the reign of her Majesty Queen Victoria, intituled, "An Act for the relief of Insolvent Debtors," and after the day in the said act named and appointed for the said acts coming into operation, and after the first day of November, in the year of our Lord 1842, and before the passing of the act of Parliament made and passed in the sessions of Parliament held in the seventh and eighth years of the reign of her Majesty Queen Victoria, intituled, "An Act to amend the Law of Insolvency, Bank-

The stat. 5 & 6 Vict. c. 116, s. 1, ✓ takes away from a party, presenting a petition for protection from process under that statute, the right to sue for an outstanding debt; and confers it, till final order, on the official assignee.

Plea to an action of indebitatus assumpsit for wages as a hired servant, and on an account stated, that, after the accruing of the causes of action, and before the passing of the 7 & 8 Vict. c. 96, the plaintiff had presented a petition for protection from process under the 5 & 6 Vict.

c. 116, s. 1; and that an official assignee had been appointed, in whom his estate and effects were vested. The plea set out all the facts necessary to render the order valid under that section: *Held*, on demurrer, that the plea was a sufficient answer to the action.

Held, on special demurrer, that it was not necessary that the plea should contain a positive averment that the plaintiff had creditors, or that the schedule which he presented contained the debt sued for.

Nor that it should negative that the suit was brought on behalf of the official assignee, and with his consent.

Nor that the notice of the plaintiff's intention to present the petition should be stated to have been given after the passing of the act; it being expressed to be given "according to the schedule to the said first mentioned act annexed, and according to the true intent and meaning of the said first mentioned act."

Nor that the time when the matter of the petition was to be heard, should be stated to have been advertised in the *London Gazette*, &c., "one month at the least" after the date of the notice.

Nor that the order of the Court of Bankruptcy, which appointed the commissioner who granted the order for protection, should be stated to have been approved of by the Lord Chancellor.

11 - CB. 672.

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ruptcy, and Execution," and before the commencement of this suit, to wit, on the 16th day of March, in the year of our Lord 1843, the plaintiff presented a petition for protection from process to the Court of Bankruptcy in the said first mentioned act, mentioned and described as the Court of Bankruptcy, which petition, at the said time of its being presented, had annexed to it a full and true schedule of the debts of the plaintiff, with the names of his creditors, and the dates of contracting such debts severally, and the nature of such debts, and the security given for the same; and also of the nature and amount of the plaintiff's property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities which he had for such debts, and which contained no proposal, the plaintiff having no such proposal to make, for payment in whole or in part of his debts. And the defendant further says, that before the presenting of such petition, to wit, on the 9th day of March, in the year of our Lord 1843, the plaintiff gave notice according to the schedule to the said first mentioned act annexed, and according to the true intent and meaning of the said first mentioned act in that behalf, to one-fourth in number and value of his creditors, that he, the plaintiff, intended to present a petition to the said Court of Bankruptcy, praying to be examined touching his debts, estate and effects, and to be protected from all process, upon making a full disclosure and surrender of such estate and effects for payment of his just and lawful debts, and that the time when the matter of the said petition should be heard, was to be advertised in the *London Gazette* and in the *Morning Post* newspaper, one month at the least after the date of the said notice; which notice, at the said time of its being so given, was in writing, and signed by the plaintiff, and was in the words and figures following, that is to say, "I, William Sayer" (meaning the plaintiff) "at present and for three months past residing at No. 73, Seymour Street, Euston Square, in the parish of St. Pancras and county of Middlesex, and for twenty-four months immediately preceding

residing at No. 42, Bryanstone Street, Portman Square, in the parish of St. Marylebone, in the county of Middlesex aforesaid, and being a solicitor's clerk, do hereby give notice that I intend to present a petition to the Court of Bankruptcy, Basinghall Street, in the city of London, praying to be examined touching my debts, estate and effects, and to be protected from all process, upon making a full disclosure and surrender of such estate, and effects, for payment of my just and lawful debts. And I hereby further give notice, that the time when the matter of the said petition shall be heard is to be advertised in the *London Gazette*, and in the *Morning Post* newspaper, one month at least after the date hereof. As witness my hand, this 9th day of March, in the year of our Lord 1843. William Sayer," (meaning the plaintiff). "Witness, R. S. Hadwen, 16, Clifford's Inn, attorney for the said William Sayer," (meaning the plaintiff). And the defendant says, that after the giving of such notice, and before the presenting of such petition, the plaintiff caused the same notice to be inserted twice, to wit, once on the 9th day of March, in the year of our Lord 1843, and a second time on the 12th day of March, in the year of our Lord 1843, in the *London Gazette*, and twice, to wit, once on each of the days and times last aforesaid, in a newspaper at those times respectively circulating in the county of Middlesex, to wit, a newspaper called the *Morning Post*. And the defendant further says, that for and during the period of twelve calendar months next before and at each of the said times respectively of giving the said notice, and of causing the same to be inserted in the said gazettes and newspapers, the plaintiff had resided and did reside within the said county of Middlesex, and within the district in the said first mentioned act, mentioned and described as the London district; and that the plaintiff was not, at any of the times of the giving or inserting of any of the said notices, or at the time of the presenting of the said petition, or at any time a trader within the meaning of the statutes, at the time of the passing of the said first mentioned act, or at any time in force relating to bankrupts.

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And the defendant further says, that afterwards and before the commencement of this suit, and before the passing of the said secondly mentioned act, to wit, on the 16th day of March, in the year of our Lord 1843, the said petition was filed in the said Court of Bankruptcy in due form of law, and according to the directions and provisions in that behalf of the said first mentioned act. And the defendant further says, that upon the filing of the said petition, and before the commencement of this suit, and before the passing of the said secondly mentioned act, to wit, on the day and year last aforesaid, John Herman Merivale, Esq., Barrister-at-Law, then being the commissioner in rotation of the said Court of Bankruptcy, who, by an order of the said Court theretofore, to wit, on the day and year last aforesaid, in that behalf made by the said Court, according to the directions and provisions of the said first mentioned act, was appointed by the said Court to hear the matter of such petition; and to whom, by the said order of the said Court, the said petition was referred; by an order of him, the said John Herman Merivale, then in that behalf made by the said John Herman Merivale in the matter of the said petition, gave to the plaintiff protection from all process whatever, either against his person or his property, of every description; and by which said order the said John Herman Merivale, then being such commissioner, directed and ordered that such protection was to continue in force, and that all process, except process for arresting or holding to bail under the authority of a Judge's order for that purpose, was to be stayed until the 28th day of April, in the year of our Lord 1843, at two o'clock in the afternoon, being the time appointed for the appearance of the plaintiff at the said Court of Bankruptcy in Basinghall Street, London, and for the final examination of the plaintiff, according to the form of the said first mentioned act. And the defendant further says, that upon the presentation of the said petition, and before the commencement of this suit, and before the passing of the said secondly mentioned act, to wit, on the 16th day of March, in the year of our Lord 1843, the said

John Herman Merivale, then being such commissioner of the said Court of Bankruptcy, so appointed to hear the matter of the said petition, and to whom the said petition was so referred as aforesaid, by an order then by him made in the matter of the said petition in due form of law, and according to the directions and provisions of the said first mentioned act, nominated and appointed George Green, then being an official assignee of the said Court of Bankruptcy, to be the official assignee of the estate and effects of the plaintiff, according to the true intent and meaning of the said first mentioned act, and the provisions thereof in that behalf. And the defendant says, that the said George Green always from the time of the making of the said order has been, and still is, the official assignee of the estate and effects of the plaintiff, and to all intents and purposes, the sole assignee of the estate and effects of the plaintiff. Verification.

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Special demurrer.

The plaintiff's points for argument were, that it is not shewn by the said plea that the said estate of the plaintiff was vested in the assignee in such a manner as to prevent the plaintiff from suing in this action, or that the official assignee ever interfered with or laid claim to the causes of action now sought to be recovered. There were other causes of demurrer shortly alluded to in the argument.

Hawkins (with whom was *Lush*) in support of the demurrer (a). The main question is, whether it is any answer to an action in indebitatus assumpsit for work and labour, to say that the plaintiff has petitioned the Court of Bankruptcy for protection from process under the 5 & 6 Vict. c. 116 (b), and that an order for protection has been made,

(a) In the Vacation after Michaelmas Term.

(b) The following are the material sections of the statute 5 & 6 Vict. c. 116, alluded to in the argument.

Sect. 1. "Whereas it is expedient to protect from all process against the person such persons as have become indebted without any fraud or gross or culpable negligence, so as nevertheless

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and an official assignee appointed, in whom his estate and effects are vested. It is submitted that it is not. The first

their estates may be duly distributed among their creditors:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that if any person not being a trader within the statutes now in force relating to bankrupts, or if any person being such trader, but owing debts amounting in the whole to less than three hundred pounds, shall give notice, according to the schedule to this act annexed, to one-fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the *London Gazette*, and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the Court of Bankruptcy, if he has resided twelve calendar months in London or within the London district, or to the commissioner of bankrupt in the country within whose district he may have resided within twelve calendar months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts, severally, the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to

him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall be thereupon lawful for the Judge or commissioner of the Court of Bankruptcy to whom, by any order of the Court, as herein-after provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in Court, as herein-after provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue

section of that statute provides that any person, not being a trader, owing less than 300*l.*, on giving and publishing

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of the statute relating to bankrupts."

Sect. 4. "That the commissioner so authorized, or the commissioner in the country, (as the case may be,) shall, on the day notified by such notice as aforesaid, proceed to examine upon oath the petitioner, and any creditor who may attend such examination, and any witness whom the petitioner or any creditor may call; and the said commissioner may adjourn the examination from time to time, and summon to be examined before him any debtor of such petitioner, or any creditor of such petitioner, or any other person whose evidence may appear necessary for the purposes of the inquiry; and if it shall appear to the said commissioner that the allegations in the petition and the matters in the schedules are true, and that the debts of the petitioner were not contracted by any manner of fraud or breach of trust, or any prosecution against the petitioner whereby he had been convicted of any offence, or without having at the time of becoming indebted reasonable assurance of being able to pay the debts, and that such debts were not contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious tres-

pass, and that the petitioner has made a full discovery of his estate, effects, debts, and credits, and has not parted with any of his property since the presenting of his petition, it shall then be lawful for the said commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make an order, unless cause be shewn to the contrary; which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner on such day, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition, provided that the consideration of such final order may be adjourned from time to time by the commissioner without any fresh notice: provided always, that it shall be lawful for the said commissioner, if he shall think fit, to direct in such final order some allowance to be made for the support of the petitioner out of his estate and effects."

Sect. 7. "That from and after the passing of the final order the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to her

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the required notice, may present a petition to the Court of Bankruptcy, stating the debts owing by and to him, whereupon the Judge or commissioners of the Court of Bankruptcy may grant an order for protection from all process whatever until the appearance of the petitioner in Court, as thereafter provided: "and upon the presentation of any such petition, all the estate and effects of the petitioner shall forthwith become vested in the official assignee, who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit." The official assignee, therefore, becomes entitled only to the "chattels and effects" of the petitioner; not to his "credits," which cannot be obtained without suit. The official assignee in fact takes, by the words of the statute, that property which would otherwise have had to be conveyed to him by deed; and his rights under the statutable transfer, where there is no power conferred on him by statute to sue, as is here the case, can be no greater than those of an assignee by deed. Therefore, even if the words "chattels and effects" could extend to include "credits;" which, it is submitted, a consideration of the subsequent sections in the act, which will presently be adverted to, shews cannot be done; the plea would still be open to the defect that it does not negative that this is

Majesty, as in the United Kingdom of Great Britain and Ireland, all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee, and assignee chosen by the creditors, without any deed or conveyance, which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat, and shall sue and be sued as if they had

been assignees under such fiat; and as often as any such assignees shall die or be lawfully removed, and a new assignee duly appointed, all estate, real and personal, and such effects and credits, as were or remained vested in such deceased or removed assignee shall vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed or conveyance for that purpose."

the assignee's suit brought in the name of the petitioner. [Coleridge, J.—Should not that fact come from the plaintiff by way of reply? Suppose that this were an action for a chattel, or supposing the words “choses in action” were included in the first section, would it not be a sufficient *prima facie* defence, that by virtue of the presentation of the petition, the chattel or chose in action had become vested in the official assignee?] The gist of the defence being that another person and not the plaintiff is entitled to sue, the defendant should so state it as to exclude the possibility of the plaintiff being entitled. But, it is submitted, that on examining the subsequent sections of the act of Parliament, a chose in action like the present does not pass to the official assignee. The fourth section provides, that upon the day appointed for examination of the petitioner, the commissioner, if satisfied with the allegations, &c. of the petitioner, and that he “has made a full discovery of his estate, effects, debts and *credits*,” may make a final order for his protection, “which order shall be called a final order, and shall be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors,” &c. And by the seventh section it is provided, “that from and after the passing of the final order, the whole estate, present and future, as well real as personal,” “all the effects and *all the credits* of the petitioner shall become absolutely vested in the official assignee and assignee chosen by the creditors, without any deed or conveyance, which assignees shall hold the same as fully as if the petitioner had been made a bankrupt, and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat.” It is clear, therefore, that the Legislature has drawn a marked distinction between the quantity of interest which is transferred by the order of protection to the official assignee, and that which is transferred by the

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final order to the official assignee and creditors' assignee; and that the latter alone are entitled to sue upon any cause of action which the petitioner may possess. The words in the first section merely convey the "estate and effects" of the petitioner, except such as cannot "be reasonably obtained and possessed without suit;" and then when the final order is granted under the fourth section, upon the commissioner being satisfied that the petitioner "has made a full discovery of his estate, effects, debts, and *credits*," the seventh section shews that the "estate," the "effects," and the "*credits*" of the petitioner become then absolutely vested "in the official assignee and the assignee chosen by the creditors." [*Coleridge, J.*—Suppose that your argument is correct, and that the petitioner brings an action after the date of the order of protection, and before the final order, what is to be the effect of the final order in such a case? Is the action to abate?] Probably, in such a case, the action would be carried on by the assignees in the petitioner's name. [*Coleridge, J.*—But the act says that the assignees "shall sue and be sued as if they had been assignees" under a fiat in bankruptcy.] Possibly there may be a difficulty in the language of the act in this respect. [*Coleridge, J.*—Suppose the official assignee were to demand and receive payments from a debtor of the petitioner? Could the latter treat this as a wrongful payment, and sue the debtor for the same debt.] No doubt there are many difficulties in this construction of the act, but in any way of viewing it, some difficulties will be found to arise. [*Patteson, J.*—It certainly cannot be supposed that the Legislature intended that the debtor of a petitioner should not be sued during the time that may elapse from granting an order for protection and the final order. Supposing, however, that "*credits*" are to be included in the first section, as there is no power given by the act to the provisional assignee to sue in his own name, must he not sue in that of the petitioner?] It is submitted that he must, and, therefore, even in that view the plea is no answer.

The words in the 6 Geo. 4, c. 16, s. 63, which vests a bankrupt's estate in his assignees, are much more comprehensive. There "all debts due or to be due to the bankrupt," are to be assigned by the commissioner (a) to the assignees, "and such assignment shall vest the property, right, and interest in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof;" "but such assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt." With regard to the intention of the Legislature on the subject, reference may be made to the 1 & 2 Wm. 4, c. 56, which constitutes the Court of Bankruptcy, by sect. 23 of which, the official assignee appointed in the case of bankrupts, is expressly restricted from interfering "in directing the time and manner of effecting any sale of the bankrupt's estates or effects." A case arose under the Scotch Bankrupts' Act, 54 Geo. 3, c. 137, s. 29, which enables the assignee to take such legal steps as may be effectual for recovering possession of the "estate and effects" wherever situate, whether those words would convey a right to sue (b); and Lord *Ellenborough* there said, "I have looked into the statute with great anxiety, because this is a question of considerable moment, and it came upon me at the time by surprise; but I cannot find any words conveying to the plaintiff a right of suit. The utmost extent to which the language of the act can be carried, is to a right of property. What may have been the intention of those who framed the act I will not say; but it is certain that the acts contain no expressions large enough to convey the right contended for. I take it for granted that the

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(a) See sect. 12, which vests ✓ (b) *Jeffery v. M'Taggart*, 6 M. the estate, &c. of the bankrupt & S. 126.
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framer of the act was aware of the law of England touching the assignment of a chose in action; I cannot, therefore, suppose that the Legislature had a larger object in view than what they have accomplished." [Coleridge, J., referred to the fourth section of 5 & 6 Vict. c. 116, where it is stated that the final order shall vest the "estate and effects" in the official and creditors' assignees, as being a short mode of stating what is enacted by the seventh section in extenso.] But even should the Court be of opinion that the plea is in substance an answer, it is submitted it is clearly defective in form. There is no positive averment that the plaintiff had any creditors, or that the schedule which he presented contained this debt. [Wightman, J.—It states that he petitioned for protection from process.] Then the notice is said to be given before the presenting the petition, but is not said to be after passing the act. [Wightman, J.—It says that he gave a notice "according to the schedule to the said first mentioned act annexed, and according to the true intent and meaning of the said first mentioned act." That must mean that it was given after the act was passed.] It is not said that the time when the matter of the petition was to be heard was advertised in the *London Gazette*, &c., "one month at the least" after the date of the notice, which ought to be done according to the form given in the schedule. [Coleridge, J.—The act does not in terms require the petitioner to do so. It may be that it ought to be done by the Court itself.] It is not shewn that the order of the Court of Bankruptcy, which appointed the commissioner, was approved of by the Lord Chancellor, as required by sect. 3; nor that at the time of granting the order of protection the commissioner was acting in the matter of the petition. [Coleridge, J.—The 13th section empowers the Judges and commissioners to make orders, which are, *primâ facie*, binding.]

T. Jones (with whom was *Peacock*) contra. With respect to the main question in the case, it is submitted that the

words "estate and effects" are quite sufficient to include debts due to the insolvent. The 1 & 2 Wm. 4, c. 56, s. 25, which vests the estate of bankrupts in the assignees under a fiat, uses the words "personal estate and effects," which are certainly not larger than those here used. Under the 6 Geo. 4, c. 16, s. 63, it has been decided that the words "personal estate" convey the right to maintain an action for unliquidated damages, which have accrued before the bankruptcy, by non performance of a contract; *Wright v. Fairfield* (a). Lord *Tenterden* there says, "I have not been able to entertain any doubt upon this point. It appears to me that the object of the act 6 Geo. 4, c. 16, was to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate." His Lordship then adverts to the words of the 63rd section: "The words there used are, 'all the present and future personal estate of such bankrupt, wheresoever the same may be found or known,' and 'all debts due or to be due to the bankrupt.' There can be no doubt that the subject-matter of the present action comes within one or other of these descriptions: I should say that it passed under the words, 'all the present and future personal estate.' If it were held that a claim of this kind did not vest in the assignees, the consequence would be, that a right to damages, which would have been highly beneficial to the estate, might be released by the bankrupt." Besides, the words at the end of the first section shew the intention of the Legislature, and the quantity of interest intended to be passed, when they say that "the official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." The right to bring an action for unliquidated damages is not only taken away from the insolvent, but is vested in the official assignee. Whether he may sue in his own name,

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✓(a) 2 B. & Ad. 727, 731.

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or is obliged to use that of the insolvent, is another question, which it is not necessary to decide; for in the former case, the plea is a complete answer to the declaration; in the latter, it is a *prima facie* answer. It is not possible for the defendant to say with what view the plaintiff is suing. It is sufficient for the defendant to shew a *prima facie* answer to the action; and, if there exists a state of facts under which, notwithstanding, the action is well brought, it is for the plaintiff to shew it by his replication. The general rule of pleading is, that a party need not aver in pleading what more particularly exists in the knowledge of his adversary. It will not be presumed that the official assignee has appointed the insolvent to sue for him. [Lord *Denman*, C. J.—It is not a very usual act for the assignees of a bankrupt to appoint him to sue for them.] At any rate it should come by way of replication from the plaintiff; *Winch v. Keeley* (a); *Dangerfield v. Thomas* (b). As to the considerations arising upon the policy of the law, it is clear that they are in favour of the defendant. In *Smith v. Coffin* (c), which decided that a right to bring a real action passed to the assignees of a bankrupt, *Eyre*, C. J., says, "All the bankrupt acts being in *pari materiâ*, are to be construed together. It is true that on general principles, rights of action are not forfeitable, nor assignable, except in a particular mode; but that rule is founded on the policy of the common law, which is averse to encourage litigation; but in this case the policy of the Bankrupt Laws requires that the right of action should be assignable and transferred to the assignees, as much as any other species of property. It is an hereditament, and the words of the several statutes are large enough to comprehend it, and no case has been shewn to prove that it ought not to pass. What then does the whole argument amount to but this, that in many cases from the policy of the law, a right of action does not pass.

✓ (a) 1 T. R. 619.

1 P. & D. 287.

(b) 9 A. & E. 292; S. C.

(c) 2 H. Bl. 444, 461.

But here the policy is, that every right belonging in any shape to the bankrupt, should pass to his assignees. And this being the clear intent of the law, a particular recital of this species of right could not be necessary. I, therefore, think it a clear case, both on the words of the acts of Parliament, and on the subject-matter."

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As to the objections in form to this plea, they have already been answered by the Court. The objection that it is not stated that the time when the matter of the petition was to be heard was advertised "one month at least" after the date of the notice in the *London Gazette*, is founded upon the supposition that that is required by the first section, which is not the case. It is only an averment contained in the notice itself, as given in the schedule, and may possibly be essential to be performed, but certainly need not be averred in a case like the present. [*Wrightman, J.*—You will say then that that part of your plea which relates to the advertisements of the time when the petition is to be heard, is all surplusage, and was not necessary to be stated.]

Hawkins, in reply. *Wright v. Fairfield (a)* is distinguishable; for there the terms of the act are different, giving the assignees an express right to sue for a chose in action. Besides the object of the two acts is different. The object of the 5 & 6 Vict. c. 116, on the appointment of official assignees, is merely to protect the estate of the petitioner till a final order can be made; the object of the 6 Geo. 4, c. 16, s. 63, was to vest the whole estate of the bankrupt in the assignees for immediate distribution. Besides, the words of the first section of the 5 & 6 Vict. c. 116, seem to shew that a chose in action was not intended to be included; for the words are, that the "official assignee shall and may forthwith take possession of so much thereof," &c.; and it is difficult to see how an assignee could take

✓ (a) 2 B. & Ad. 727.

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possession of a chose in action. Every chose in action would not pass to the assignee (a). [*Wightman*, J.—All that is of advantage to the personal estate of the insolvent would pass.] The case of *Dangerfield v. Thomas* (b), which was cited to shew that the fact ought to come from the plaintiff by way of replication, does not apply. There, a *primâ facie* case had been set up by the plea, and the replication was to defeat that *primâ facie* case. Here no *primâ facie* defence has been set up at all, if the plaintiff is correct in his argument.

Lord DENMAN, C. J.—In this case the plaintiff is suing for the amount of his salary, which he claims for his work and labour as the hired servant of the defendant, and also for a sum due on an account stated. The defendant has pleaded, that before the commencement of the suit, the plaintiff had obtained an order for protection from process under the 5 & 6 Vict. c. 116, whereby his property became vested in the official assignee. It states all the particulars connected with obtaining that order, and, amongst the rest, the notice of the petition, its presentation, the appointment of the commissioner, the granting of the order, and the appointment of the official assignee; and we think that the plea states fully all the necessary facts to raise the defence intended to be set up.

All the objections in point of form which were taken were disposed of during the argument, with the exception of that which stated that the advertisements of the time when the petition was to be heard, should have been averred to have been inserted one month at the least after the date of the notice; and we think that there really is nothing in that objection.

The real question is as to the plaintiff's right to sue. Is the plea then in substance an answer? I think it is.

(a) See *Beckham v. Drake*, 11 M. & W. 315.

(b) 9 A. & E. 292; S. C. 1 P. & D. 287.

I think the right to bring this action is taken away from the plaintiff, and is vested in the official assignee; and the power of suing cannot be at the same time in two persons. The first section of the 5 & 6 Vict. c. 116, enacts, that upon the presentation of a petition which shall have annexed to it a schedule of his debts, with the names of his creditors, and also of the nature and amount of his property, and of the debts owing to him, and the names of his debtors, "all the estate and effects of the petitioner shall forthwith become vested in the official assignee." It is said, however, that the official assignee cannot sue to recover a debt, because the words that follow, "and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit," limit his right to such property as he can immediately take possession of; an unreasonable use of these not very reasonable words. These words are really without meaning; for suppose the question arose on pleading, or on issue joined, how could the Court or jury say what property he could "*reasonably* obtain and possess without suit." They seem rather intended by the Legislature as a hint to the provisional assignee, to lose no time in taking possession of such property as may be immediately available; but are not meant to take away the right to sue. The section then goes on to say that "the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts." Here we have an express reference to the rights possessed by official assignees under the Bankrupt Act; and when we look at those rights, we find that in *Wright v. Fairfield* (a), Lord Tenterden and the other Judges were all of opinion, that under the words "all the present and future personal estate," a right to sue for unliquidated damages, which had accrued before the bank-

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ruptcy, by non performance of a contract, passed to the assignees:—and the words “personal estate” cannot be said to have a more extended signification than “estate and effects.” Mr. Justice *Parke*, it is true, does not put his decision expressly on that view; but if he had thought it was incorrect, he would, no doubt, have stated his dissent.

The language of the seventh section has raised an ingenious argument; but it cannot be contended, that to give it its proper construction, it is necessary to hold that the “estate” and “effects” of the petitioner did not pass to the official assignee under the first section; and, if not, why, because we find also the words “the credits” of the petitioners in the latter section, are we to say that they are excluded from the first? It seems to me that these words are superfluous; and, therefore, unless we had reason to believe that “credits” were not included under “estate and effects” in the first section, the circumstance of their being found in the seventh section ought not to make us hold so.

The argument as to the inconvenience which might arise if no one were entitled to sue between the order for protection and the final order, may be met by the inconvenience of the opposite construction, if the petitioner himself were allowed to sue. Perhaps as soon as the official assignee is possessed of the right to sue, he may sue in his own name; and I think he may.

COLERIDGE, J. (a). I am of the same opinion. Two questions have been raised in the present case; first, whether the right to sue with respect to a chose in action is taken out of the insolvent and vested in the official assignee; and secondly, whether the official assignee can sue in his own name.

The first is the only question necessary to be answered; and as to that, I think the power to sue is taken out of the insolvent. The words used in the first section

(a) *Patteson*, J., had left the Court during the argument.

are "estate and effects;" and, no doubt as far as the policy of the statute goes, it is better to hold that all the estate of what kind soever, should vest in the official assignee; and some opening to fraud, on the part of the insolvent, might be prevented, by holding that he is divested of the whole estate. Now, as to the meaning of these words "estate and effects," we are referred by the latter end of the first section to the statute of 1 & 2 Wm. 4, c. 56, which first mentions an "official" assignee. That statute refers to the statute of 6 Geo. 4, and there we find the words "present and future personal estate" were held in *Wright v. Fairfield* (a) to extend to a right to bring an action. It is said, however, that the words in the seventh section, "the whole estate, present and future," point at choses in action; but I think they do not. A chose in action may be "present" as much as any other part of the insolvent's estate. The word "future" relates to the time when the interest accrues.

If this question rested alone on the terms of the first section, it would be free from doubt; but Mr. *Hawkins* relies on the terms of the seventh section. It is clear, however, to me, that that section includes no more than the first section; because, in the fourth section, where the effect of the final order is stated, the words "estate and effects" are used as a compendious form of including what is more particularly specified in the seventh section. He relied also on the words "absolutely vested" in the seventh section, to shew that they were only provisionally vested before the final order; but that argument would prove too much; for the seventh section includes the present estate as well, and it is not contended but that that was vested in the official assignee by the terms of the first section.

The second question it is not necessary to decide, as, at any rate, the plea shews a *prima facie* right in the official assignee to sue; but I do not understand the meaning of a chose in action passing, unless the right to sue pass also.

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WIGHTMAN, J.—I think it unnecessary to give my opinion at any length after the case has been so fully gone into by the Lord Chief Justice and my learned Brother ; but I fully concur in this decision. The construction contended for by the plaintiff would defeat the object of the statute. If the insolvent were to bring actions in his own name, it might be difficult for the creditors to get at the proceeds of such actions. There would be nothing to prevent an official assignee from suing in his own name in an action of trover ; and I do not see, therefore, why he should not bring an action like the present.

Judgment for Defendant.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

In the matter of MARY JANE DALEY.

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CHANNELL, Serjt., moved that the officer of the Court should be directed to receive an acknowledgment of a deed pursuant to the 3 & 4 Wm. 4, c. 74 (The Fines and Recoveries Act). The affidavit on which the application was founded stated that the woman in question was the wife of the Drum Major of her Majesty's 84th regiment of Infantry, which had been sent to Madras. On the 17th of May, 1847, *Williams*, J., on application issued a commission to four officers of the regiment, directing them to take the acknowledgment of Mrs. Daley. By the time the commission reached India, the regiment had been removed to Secunderabad, which was about three hundred miles from Madras. There two of the commissioners took the acknowledgment, and the usual affidavit was made, of the woman having acknowledged the deed, by one of the commissioners, who was sworn before a person signing himself James Robertson, and who described himself as a justice of the peace. No notarial certificate, however, had been made

The Court permitted an acknowledgment of a married woman, made in India, under the 3 & 4 Wm. 4, c. 74, to be received, on producing a verified certificate of a superior military officer, that the person, before whom the affidavit of acknowledgment was made, was a justice of the peace; there being no notary at the place of acknowledgment.

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that the person before whom the affidavit had been made was a justice of the peace. This defect was caused by the fact that there was no notary at Secunderabad. There was, however, the certificate of Benjamin Lovell, Major General, commanding the Hyderabad subsidiary force; and in it he stated that the commissioner, who swore the affidavit, was sworn in his presence to its truth before the said J. Robertson, and that the said J. Robertson was a justice of the peace for the Cantonment, and as such qualified to administer oaths; and that the names of the said commissioner and J. Robertson, subscribed to the affidavit, were of their handwritings respectively. General Lovell, in his signature to the certificate, described himself "Major General, commanding the Hyderabad Subsidiary Force, where there is no notary." An affidavit was also sworn that inquiries had been made at the East India House, where it was stated to be usual for officers at distant stations, where there was no notary, to act in that character, and to certify accordingly. On application at the office of the Court, an objection was made to receive the acknowledgment, on the ground that sufficient evidence was not produced that no notary was to be found within a reasonable distance of Secunderabad.

WILDE, C. J.—There is a difficulty in enforcing the act of Parliament with due security to all parties interested. It has been decided that a notarial certificate, as to the power to administer an oath of the party, before whom the affidavit of acknowledgment is made, is sufficient. But what shall be required where no such person exists, has not been determined; and that is the difficulty which presents itself in the present case. In lieu of a notarial certificate, that of a person who describes himself as a Major General in the army, is substituted. There is, however, no affidavit to shew that the gentleman who granted that certificate holds that rank, or that the certificate is in his handwriting. On these materials we could not grant the application. But the Court thinks that it may act on the certificate of

a Major General, as to the power of the person before whom the affidavit was sworn, on an affidavit being produced that he does hold that rank, and that the certificate is in his handwriting. On the production of such an affidavit, the officer may receive the acknowledgment.

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Application granted accordingly.

Channell, Serjt., on a subsequent day, produced an affidavit to the effect required.

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D*OWLING*, Serjt., moved for leave to amend the date of the writ of summons by which this action had been commenced, as well as the date of the subsequent writ, in order to prevent the operation of the Statute of Limitations. The six years from the accruer of the action expired on the 14th day of January, 1847. The writ commencing the action was dated on the 11th of January, and, consequently, expired on the 10th of May, and was entered in conformity with the provisions of the 2 Wm. 4, c. 39, s. 10. On the 9th of June, an alias writ was issued, which expired on the 8th of October. The month within which that writ should have been entered of record in conformity with the statute, expired on the 7th of November, but that day was a Sunday. On Monday the 8th, when an application was made to the proper officer to enter the writ of record, he refused to permit the entry to be made. The object of the application, therefore, was either to amend the original writ, by altering its date from the 11th to the 13th, and amending the date and indorsement of the subsequent writ, so as to enable the plaintiff to continue

The Court refused to alter the date of a writ to a day different from that on which it issued, so as to comply with the provisions of the 2 Wm. 4, c. 39, s. 10, in order to prevent the operation of the Statute of Limitations; although it had been issued three days before the expiration of the six years from the accruer of the cause of action: but allowed a writ, not tendered in due time in continuation of process, to be entered of record of the day, on which it was tendered.

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the process in conformity with the provisions of the statute, in order to avoid the effect of the Statute of Limitations; or to be permitted to enter of record the last writ, according to its true date of entry, on the 8th of November. No injury could be done to the defendants by the proposed amendment, because the plaintiff might have commenced his action as late as the 14th of January, 1847; and then, if the subsequent writ in continuation had been issued and entered as proposed by the amendment, the statute would have been saved. The Court would be disposed to assist the plaintiff in complying with the provisions of the 2 Wm. 4, c. 39, s. 10, under such circumstances, in order to avoid the operation of the Statute of Limitations. [*Wilde*, C. J.—If the plaintiff has thought proper to commence his action some days sooner than he need, and has not continued it in conformity with the law, that is a benefit, of which the Court ought not to deprive the defendants.] The 10th section enacts, “that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ.” Notwithstanding those provisions, the Courts had, in a variety of cases, interfered by amendments to prevent the operation of the Statute of Limitations. Thus in *Eccles v. Cole* (a), the Court amended a writ of

✓ (a) 8 M. & W. 537; S. C. 1 Dowl. N. S. 34. ✓

summons, although more than four months had elapsed since it was issued; by altering the cause of action from debt to assumpsit; on an affidavit that if a fresh action were commenced, the Statute of Limitations would be a bar. So in *Lakin v. Watson* (a), the Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff, on the ground that the right of action would otherwise be lost by the Statute of Limitations. In that case, the Court intimated that they would not authorize any amendments of a writ for the future, excepting those cases where the remedy would otherwise be lost by the operation of the statute. Again, in *Williams v. Williams* (b), where, after the argument of a demurrer to a replication, setting out continuing writs in answer to a plea of the Statute of Limitations, the plaintiff was allowed to amend, by stating the indorsement on the writs as containing the date of the return of the writs, in conformity with the Uniformity of Process Act; and the Court, on a subsequent application, also allowed the writs themselves to be amended accordingly. So in *Mavor v. Spalding* (c), where the indorsement on the alias and pluries was regular, with the exception that they did not contain the date of the return of the first writ, the Court allowed the plaintiff to amend even after the defendant had pleaded the Statute of Limitations, and issue was joined. And in *Culverwell v. Nugee* (d), the Court of Exchequer, in order to save the Statute of Limitations, allowed an alias and pluries writ of summons to be amended, by inserting therein the date of the first writ, and the return thereto. [Maule, J.—In those cases nothing false was stated by the amendment which the Court made; but by the amendment here proposed in altering the first writ, we should in fact be making it appear that it had issued on a

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(a) 2 Cr. & M. 685; S. C. 2 Dowl. 633.
 (c) *Ante*, vol. 1, p. 878.
 ✓ (d) *Ante*, vol. 4, p. 30; S. C. 15 M. & W. 559.
 (b) 10 M. & W. 476; S. C. 2 Dowl. 509, N. S.

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day different from the true one.] The effect of the modern cases upon the subject was, that if the Court had any thing whereby to amend, they would make the amendment. [Wilde, C. J.—There is nothing in the present case whereby we can amend.] If the first writ were amended in pursuance of the common law power of the Court, the subsequent writ might be amended accordingly. [Wilde, C. J.—The present application goes beyond any precedent which has been cited. We are asked to infringe a precise enactment of the Uniformity of Process Act, and to do that by stating on the record something which is false. We will, however, look into the cases.] If the Court should refuse this part of the application, the plaintiff would, at any rate, be entitled to enter it as of the day on which it was tendered to the officer. That was conceded by the Court in *M^cKellar v. Reddie* (a).

Cur. adv. vult.

WILDE, C. J.—In this case the application was, that the Court should make an alteration in a writ of summons, by striking out the true date, and inserting a false one; and the object of the alteration was to enable the plaintiff to proceed with an action, to which, otherwise, the Statute of Limitations would be a bar. The Court were anxious to see the decisions on the subject; and we have looked at all the cases referred to, and all that we could find bearing upon the point; and my learned Brothers agree with me that, in all, the Statute of Limitations was saved for reasons which are inapplicable to the present case. The Uniformity of Process Act expressly requires that the true date shall be inserted in the writ; and we are asked, in the face of this, to insert a false one. What grounds are there for the Court to do this? Because (it is said) if the writ be not amended, the defendants will take advantage of the Statute of Limitations. Now, that they should be able to

(a) 5 Scott, N. R. 192; S. C. 4 M. & G. 769. ✓

do this, is just what the act intended, and we are asked simply to exclude them from a defence given them by a statute, and that without their being heard. It may be that the merits are with the plaintiff, but into the justice of the case we cannot inquire; and the Court are of opinion that the alteration ought not to be made, not only on the ground that there is no authority to warrant us in making it, but on principle. The plaintiff may, however, if he thinks proper, have the last writ entered of record as of the 8th of November, the day on which it was tendered to the officer, valeat quantum.

Rule accordingly.

Ex parte Ness.

MANISTY applied to the Court for a direction to the senior Master of the Common Pleas to receive and register a memorandum of a judgment pursuant to the 1 & 2 Vict. c. 110, s. 19, and the 3 & 4 Vict. c. 82, s. 2. It appeared from the affidavit that the person making the application, John Ness, had, on the 11th of August, 1847, recovered judgment in an action brought in the Court of Exchequer against George Burdis, as the registered public officer of the North of England Joint Stock Banking Company. By the return made on the part of the company to the Stamp Office, pursuant to the provisions of the 7 Geo. 4, c. 46, s. 4, it appeared that a person named James Sanderson, of Berwick, was a member of the company. It was proposed therefore to charge Sanderson's real estate with the judgment which had been obtained. Accordingly, the usual memorandum required by sect. 19 of the 1 & 2 Vict. c. 110, was prepared. That section provides, "that no judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements, or hereditaments, as

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The senior Master of the Common Pleas having declined to register a memorandum to charge real estate, (belonging to a past member of a joint stock banking company, against the public officer of which, a verdict had been obtained), pursuant to the 1 & 2 Vict. c. 110, s. 19, and the 3 & 4 Vict. c. 82, s. 2; the Court refused to compel him to receive the memorandum.

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to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account of the debt, damages, costs, or monies thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule." The memorandum was tendered to the senior Master for the purpose of registration. This he declined to receive. The object of the present application was, therefore, to obtain the direction of the Court to the Master requiring him to receive the memorandum. The judgment in the present case was clearly within the meaning of the 1 & 2 Vict. c. 110, s. 19, and the words of the section were obligatory on the Master. By the 7 Geo. 4, c. 46, s. 12, it was provided, that every judgment recovered against the public officer of such a co-partnership should have the like effect against the property of every such member as if such judgment had been recovered against the co-partnership. One of the effects of such a judgment would be to become a charge upon the land of each member, under the 1 & 2 Vict. c. 110, s. 19. Unless, therefore, the Court interfered to compel the Master to receive the memorandum and to register it, the applicant would be deprived of a right which the Legislature conferred on him.

WILDE, C. J.—No order which we could make would justify the Master in receiving and registering the memorandum, if, in point of law, it was wrong for him so to do. I think, therefore, the Court can make no order in this

matter, and it would be improper to intimate an opinion on a subject which may, on some future occasion, be presented in a more serious form for the consideration of the Court.

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COLTMAN, J., MAULE, J., and WILLIAMS, J., concurred.

Order refused (a).

(a) The memorandum was afterwards received by the senior Master of the Court.

NASH v. COLLIER.

2 C. S. CB. 177

UNTHANK moved for a rule to shew cause why the demurrer in this case should not be set aside as frivolous. It was an action by the indorsee of a bill of exchange against the defendant as the acceptor. The declaration described the defendant as "William Henry W. Collier." To this the defendant demurred, on the ground that the declaration was uncertain and senseless, by reason of the insertion of the letter W. before the defendant's name, and for describing the defendant by the initial letter only of one of his names instead of by the name itself. This demurrer, it was submitted, was clearly frivolous. The objection could not properly form the ground of a demurrer, as it only amounted to a misnomer, and would therefore, at common law, be the ground of a plea in abatement; *Com. Dig.* tit. "*Abatement*," (E 18). For at most it was an omission of a part of the defendant's Christian name; but by the 3 & 4 Wm. 4, c. 42, s. 11, pleas in abatement on the ground of misnomer were abolished, and the proper course to pursue in such a case was to take out a summons to amend the declaration at the expense of the plaintiff. Besides, the defendant's name might be "W.," for he might have been christened W. Collier. [*Maule, J.*—If

The Court refused to set aside as frivolous a demurrer to a declaration, on the ground that the defendant was described by the initial of his Christian name.

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so, then the name must have been spelt, and not a mere initial put, and then the name would be "double you." I don't think that this is a misnomer. If the name of the party is omitted altogether, or he is described by a wrong one, the objection does not appear on the face of the declaration, and, therefore, would not be a ground of demurrer; but here only a portion of the Christian name is given. I don't think we can set aside the demurrer as frivolous.]

PER CURIAM.

Rule refused (a).

(a) By the 3 & 4 Wm. 4, c. 42, s. 12, it is provided, "that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be

sufficient in every affidavit to hold to bail, and in the process or declaration to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names instead of stating the Christian or first name or names in full."

v. C. & CB - 162.

Ex parte RAYNER.

On a summons before the Judge of a County Court, the defendant pleaded judgment recovered and execution issued for the same claim. The plaintiff admitted the truth of the plea; but, notwithstanding, the Judge decided in favour of the plaintiff. A prohibition to the County Court was refused, as the decision of the Judge was on a matter within his jurisdiction.

T. H. NAYLOR moved on behalf of the defendant in a suit entitled *Toft v. Rayner*, for a prohibition to be issued to the Judge of the County Court of Cambridgeshire, held at Cambridge, in pursuance of the 9 & 10 Vict. c. 95, prohibiting any further proceedings in the suit. It appeared from the affidavit of the defendant Rayner, that he had been summoned by the plaintiff to the County Court in respect of a claim for goods sold and delivered. When the matter came before the Judge, the defendant pleaded that

*1: Pract. R. 218.
 14 - CB - 714.*

he had already been sued in the Borough Court of Cambridge in respect of the same claim; and that judgment and execution against his goods had been pronounced and issued. The plaintiff Toft, who was present at the time of the plea being pleaded, admitted it to be true. The Judge, however, pronounced judgment in favour of the plaintiff. In so doing, it was submitted that the Judge had exceeded his jurisdiction, and, therefore, that a prohibition would lie. The proper course for the plaintiff to pursue was to sue on the judgment of the Borough Court, as by the proceedings there the matter had become *res judicata*. The case was analogous to that of a spiritual Court, to which a prohibition would lie if it decided any matter properly of common law cognizance. Thus in *Gould v. Gapper (a)*, it was decided that, where the spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an act of Parliament, otherwise than the common law requires, prohibition lies after sentence; although the objection does not appear upon the face of the libel, but is collected from the whole of the proceedings below. In the present case, if a prohibition were not granted, the defendant would be entirely without remedy, as by the 9 & 10 Vict. c. 95, the County Court is constituted a Court of Record, and its decisions made final. [*Wilde, C. J.*—It was the intention of the Legislature to make the decision of the Judge in such a case final. *Maule, J.*—The difficulty which presents itself to me is this, that if this was a case for prohibition at all, it lay as soon as the plea was pleaded; but it cannot be said that the Judge was not bound to inquire into the truth of the plea. If so, then he has decided on a matter within his jurisdiction.]

WILDE, C. J.—The matter on which the Judge of the County Court has decided appears to me to have been

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/(a) 5 East, 345; S. C. 1 Smith, 528.

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within his jurisdiction. It was his duty to ascertain whether the facts alleged in the plea were true; and on those he has decided. That which is made an objection in the present case would more properly form the ground of a writ of error; but such a proceeding is prevented by the 9 & 10 Vict. c. 95.

COLTMAN, J.—I am of the same opinion. It appears to me that the case with reference to the spiritual Court is not in point; for the Judges of the spiritual Court are not Judges of the common law, but the Judges of the County Court are.

MAULE, J.—If the objection taken in the present case is well founded, it is properly the ground of a writ of error; but that proceeding is expressly abolished by the 9 & 10 Vict. c. 95. If, therefore, we were to grant a prohibition, we should be affording the defendant an advantage, which the Legislature intended he should not possess.

WILLIAMS, J.—The objection on which this application is founded appears to be this; that the Judge of the County Court who had jurisdiction over the matter in question has committed an error in point of law. But whether he was right or wrong, since he has only decided on a matter within his jurisdiction, his decision is final, and we cannot interfere in the way proposed.

Rule refused.

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Ex parte DUNN.

J.C. S.C.B. : 2/5.

PASHLEY moved for a writ of habeas corpus to bring up the body of the defendant, in order that he might be discharged out of custody. It appeared from the affidavit on which the application was founded, that the defendant had been convicted of perjury at the London Sittings after Hilary Term, 1847, before Lord *Denman*, C. J. His Lordship, pursuant to the power given by the 11 Geo. 4, and 1 Wm. 4, c. 70, s. 9, passed sentence upon him during the sittings. The defendant was then taken into custody and detained on two warrants. The first warrant was as follows: "The defendant having been this day convicted by a jury of the county of wilful and corrupt perjury, is committed to the keeper of the Queen's Prison, there to remain until he shall be discharged by due course of law." Subsequently a more formal warrant was drawn up in the following terms:

The Court refused to grant a habeas corpus in order to discharge a defendant who was detained in custody on a warrant of a Judge belonging to a Court of competent jurisdiction, which set out an adjudication, on which, if erroneous, a writ of error might be brought.

"The defendant having this day been convicted by a jury of the county of wilful and corrupt perjury, it is considered and adjudged, and ordered by me, the said Chief Justice, that he, the said R. Dunn, for the said wilful and corrupt perjury, be imprisoned in the Queen's Prison for the space of eighteen calendar months, to commence and be computed from the day on which he shall first be taken to and confined in the said prison in execution of this sentence; and that he, the said R. Dunn, do give security to keep the peace and to be of good behaviour to her Majesty and all her Majesty's liege subjects, and especially to A. B. Coutts, for the space of two years, the said two years to commence and be computed from the end and after the expiration of the said eighteen calendar months; and that he, the said R. Dunn, do give security, himself in 100*l.*, with two securities of 50*l.* each; and that he, the said R. Dunn, be further imprisoned until such securities be given; and that

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the said R. Dunn be committed to the keeper of the said prison, to be by him kept in safe custody in execution of this judgment.

(Signed)

"DENMAN."

The second warrant, it was submitted, was clearly bad, as it directed the defendant to be detained until he should give security for keeping the peace, which in point of law was not authorized as a punishment for the crime of perjury. The proper punishment which the law imposed was transportation, or fine or imprisonment. The sentence, therefore, was unwarranted by law. If it appeared on the return to the habeas corpus that the defendant was detained on a warrant in pursuance of a judgment contrary to law, it would be competent for the Court to discharge him. In the case of *Re Henry Reynolds (a)*, the Court discharged the defendant out of custody, it appearing that the sentence passed upon the defendant was not warranted by the statute under which the conviction had taken place. The defendant had been convicted on the 9 Geo. 4, c. 69, s. 1, for night poaching, and that section authorizes the justices to superadd to other punishment that of compelling the defendant to give security "for his not so offending again." The conviction, however, required him to give security that he "shall not offend again." There, the Court was of opinion that the sentence was not warranted by the statute, and, therefore, directed the defendant to be discharged. Again, at common law, the Court had no power to require in a case of misdemeanor that the defendant should be bound over to keep the peace. [*Maule, J.*—In the case of *O'Connell v. The Queen (b)*, where the defendant had been convicted of a misdemeanor, and had been sentenced by the judgment to give security for keeping the peace, it does not appear that any objection was taken on that ground (c). Besides, there is an exception in the

/ (a) *Ante*, vol. 1, p. 846.

(b) 11 Cl. & Fin. 155.

(c) But see the report, pp. 181, 214, 229, 251.

31 Car. 2, c. 2, s. 3, that the party should not be discharged, if it appeared "that the party so committed is detained upon a legal process, order or warrant, out of some Court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by the law the prisoner is not bailable." Here, however, the application is not to bail the defendant, but to discharge him absolutely on the ground of a defect in the judgment. In such a case, the proper remedy is by writ of error. With respect to the case of *Re Henry Reynolds*, that is inapplicable, because there, the defendant was detained on a summary conviction, and, consequently, a writ of error could not be brought.] That left the question still remaining of whether this was "a legal process, order, or warrant." As the judgment in the present case might still be amended in pursuance of the statute which authorized the Court at nisi prius to sentence the defendant, there was no judgment on which a writ of error could be brought.

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WILDE, C. J.—It seems to me to be clear, that if the defendant has a right to impeach the judgment which has been pronounced upon him, the proper course to pursue is to bring a writ of error. If the present application were to be granted, it would lead to the result that the judgment of a superior Court might be reviewed on a summary application, and that the proceeding by writ of error in such cases would be virtually abrogated.

MAULE, J., COLTMAN, J., and WILLIAMS, J., concurred.

Application refused.

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FIELD v. M'KENZIE, Public Officer.

Where a rule for a sci. fa. under the 7 Geo. 4, c. 46, s. 13, had been granted against persons who had formerly been partners in a banking company, the fact that the plaintiff held a collateral security from the bank, from which, with care, some fruits might be obtained, but which had not been mentioned on the application to obtain the rule, was held to be no ground for setting it aside.

MARTIN and *Hugh Hill* shewed cause against a rule which had been obtained by *Channell*, Serjt., for setting aside a previous rule (a), and all proceedings thereon, on the ground, first, that the plaintiff had wilfully suppressed certain material facts in his affidavits supporting the rule; and, secondly, that the attorney for the parties against whom the rule was obtained had been taken by surprise.

It appeared that the plaintiff was a creditor of the Newcastle-upon-Tyne Joint Stock Banking Company, and had obtained judgment in an action on a promissory note against the defendant as the public officer of that company. After certain attempts to realize the debt out of the partnership property, an application was made for a scire facias in pursuance of the 7 Geo. 4, c. 46, s. 13, against certain persons who had been members of the company at the time the contract on which the plaintiff sued was made, but who had since ceased to be such members. On shewing cause against the rule for the scire facias, the persons in question appeared by their attorney, and the rule was ultimately made absolute. In support of the present application an affidavit was produced, from which it appeared that the bank were the mortgagees for 20,000*l.* of certain collieries called Hunwick Colliery and Newfield Colliery, in the county of Durham, and that they, requiring a sum of 14,000*l.*, applied to the plaintiff for an advance to that amount. This advance he made on receiving a promissory note for that amount from the company, and secured by the assignment of the mortgage on the collieries. It was also sworn that the plaintiff was still assignee of the mortgage at the time that the rule for the scire facias was obtained, and that Stocks, the attorney for the shareholders, was unaware of that fact at the time when he shewed cause against the rule for the scire facias.

/(a) See the report of the case, *ante*, p. 172.

It was furthermore sworn, that if proper efforts were made and management used, the mortgaged property might be made available to a much greater amount than the sum in which the bank was indebted to the plaintiff. In answer to the rule, it was sworn that the plaintiff was not, according to the stipulations between him and the bank, to be bound to have recourse to the collateral security, except so far as he should think proper. It was further sworn that the property, which was so mortgaged, had been inspected by a fit person; and that it was reported by him, that in consequence of the great commercial embarrassment which then existed in the mining district, any attempt to sell it would be unavailing; and that an unsuccessful attempt to sell would be injurious; but that in time it might become of value. It was also sworn that Stocks, the attorney, was aware that the mortgage of the collieries had been assigned to the plaintiff.

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Martin and *Hill* submitted, that on the ground of surprise the application was answered. Then with respect to the proper construction of the statute, it was equally clear that the application was unfounded. By sect. 12 of the 7 Geo. 4, c. 46, it was provided, that every judgment obtained against any public officer should have the like effect against the property of the co-partnership, and of every member thereof, as if it had been recovered against the co-partnership. Then by sect. 13 it was provided, that execution might be issued upon any judgment in any action obtained against any public officer for the time being, against any member or members for the time being of such co-partnership; and "in case any such execution against any member or members for the time being of any such corporation or co-partnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any

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person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained, was or were entered into," &c. Nothing in this provision shewed that any intention existed on the part of the Legislature to compel the creditor of any banking co-partnership to have recourse to collateral securities previous to taking proceedings on the judgment obtained against the public officer. No language of the statute made any allusion to any other mode of obtaining payment of the debt than by means of an execution. The principle on which the Court proceeded in the present case in granting the rule for the scire facias, is that which was laid down in *Eardley v. Law* (a), that a party seeking to issue a scire facias must shew that he has made substantial and bonâ fide endeavours to render his execution available against the present members, and the Court will determine on the motion whether sufficient diligence has been used in each particular case. Here, the facts had been presented to the Court, and the rule had been made absolute.

Channell, Serjt., and *Bramwell*, in support of the rule, contended that the Legislature could not mean, that if a creditor of a banking co-partnership held a collateral security which might easily be rendered available, he should not have recourse to that before he proceeded to issue execution against persons who had ceased to be members of the co-partnership. The clear object of the Legislature was only to render liable those who had ceased to be members, when all other means had failed. Here, the plaintiff might render the mortgage security available in discharge of his claim, if he thought proper to use reasonable diligence for that purpose. Besides, he had acted uncandidly towards the Court in omitting to mention

/ (a) 12 A. & E. 802; S. C. 4 P. & D. 379.

the security of the mortgage. If that fact had been mentioned to the Court at the time of applying for the rule, the Court probably would not have granted it. It was clearly the duty of the plaintiff, in moving for the rule, fully to state all the material facts, on which the judgment of the Court should proceed.

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WILDE, C. J., delivered the judgment of the Court.—We have read the affidavits in this case, and we are of opinion that there is no ground for the present rule. (His Lordship then stated the substance of the affidavits.) The statements contained in the affidavits, therefore, shew no present means of payment from the resources of the company; and there is no reason why a plaintiff should not proceed under the statute against those who were formerly members of the company, because he holds a security which may, by care and management, at some future time be made productive. Consequently, there was no suppression of a material fact which would induce the Court to vary its former decision. Next as to the question of surprise. That objection, we are of opinion, also fails. Mr. Stocks might, if he had made proper inquiries, have ascertained the fact of the mortgage security being in the hands of the plaintiff. This he ought to have done; and, if it was a matter of any consequence, it should have been urged on shewing cause against the rule for the *scire facias*. It cannot, therefore, be said that Mr. Stocks has been taken by surprise, which I understand to mean that a party has discovered something since the rule was obtained, which reasonable diligence would not enable him to know on the previous occasion. The present rule must, therefore, be discharged; and, as the plaintiff has been compelled to come here without reasonable cause, with costs.

Rule discharged, with costs.

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MOORE v. FOSTER.

S. C. 5 293. 320.

Where the writ and commencement of the declaration were in debt, and the first count in the declaration might be in debt or assumpsit, but the second was in assumpsit; the Court set aside the declaration as varying from the process.

PEARSON shewed cause against a rule obtained by *Chadwick Jones*, Serjt., to set aside the declaration, on the ground that it varied from the process. The writ, as well as the commencement of the declaration, were in debt. The first count was on a bill of exchange by the plaintiff as the drawer, against the defendant as the acceptor. It alleged that the plaintiff drew his bill of exchange on the defendant, and the defendant accepted the same, and promised the plaintiff to pay him the same according to the tenor and effect thereof, but did not pay the same on the day when it became due, or at any time afterwards. The second count was on an account stated; and concluded "and the defendant afterwards, to wit, &c., in consideration of the last-mentioned premises, promised the plaintiff to pay him the said last-mentioned monies on request: Yet the defendant hath disregarded his last-mentioned promise, and hath not paid the said last-mentioned monies," &c. The first count was a good count in debt. He cited *Rotton v. Jeffery* (a); *Compton v. Taylor* (b); *Cloves v. Williams* (c); *Ashbee v. Pidduck* (d); *Stericker v. Baker* (e). If so, and the second count was in assumpsit, that was a ground of demurrer, and not a ground for setting aside proceedings for irregularity.

Chadwick Jones, Serjt., supported the rule. The writ in the present case was clearly in debt, and the declaration was not, as it ought to be, in debt, but in assumpsit. It was, therefore, irregular. He cited *Marshall v. Thomas* (f); *Thompson v. Dicas* (g).

✓ (a) 2 Dowl. 637.

1 Dowl. 370, N. S.

✓ (b) 4 M. & W. 138; S. C. 6 Dowl. 660.

✓ (f) 2 Dowl. 208; S. C. 3 M. & Sc. 98; *nom. Anderson v. Thomas*,

✓ (c) 3 Bing. N. C. 868; S. C. 5 Scott, 68.

9 Bing. 678. ✓

(d) 1 M. & W. 564.

(g) 1 Cr. & M. 768; S. C.

2 Dowl. 93. ✓

✓ (e) 9 M. & W. 321; S. C.

WILDE, C. J.—The rule must be made absolute. The process in this case was clearly in debt, and the declaration in its commencement professes to follow the writ. The first count may be a good one in assumpsit, and the second is a count in assumpsit. Consequently, there is a sufficient declaration in assumpsit. This shews that there is a variance between the process and the declaration, and the proceeding is, therefore, irregular. A party cannot be allowed to relieve himself from the consequences of his negligence in one instance, by shewing that he has been negligent in another. It is not because the declaration may be demurrable, that it is less a variance from the process.

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MAULE, J., and COLTMAN, J., concurred.

Rule absolute.

JONES v. SAWKINS.

DEBT. The declaration contained counts for use and occupation of rooms and apartments, for meat, drink, and necessaries, for money paid, and on an account stated. The defendant pleaded, first, never indebted: secondly, as to the first and third counts, so far as they relate to 6*l*, that the defendant occupied the rooms, &c., for one quarter of a year, viz., from the 25th of December, 1844, until the 25th of March, 1845, under a demise from the plaintiff for one quarter, and so on from quarter to quarter, at the quarterly rent of 6*l*; that the defendant became indebted in 6*l* to the plaintiff in respect of the above-mentioned quarter's rent, and that the account in the third count as to 6*l* parcel, &c., was stated concerning the same sum; that the plaintiff, during the continuance of the demise,

Action for use and occupation. Plea, that plaintiff wrongfully seized and detained certain goods of defendant of sufficient value to pay the rent and costs; that it was agreed that plaintiff should retain them in satisfaction of the rent, and that he did retain them. Replication, traversing the seizure of sufficient value, &c. Replication held bad, as

traversing mere inducement to the allegation of acceptance in satisfaction. Plea held good as disclosing a good accord and satisfaction.

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and nearly two years before the commencement of this suit, took the defendant's goods as a distress, they being of sufficient value to satisfy the rent and the costs of the distress and appraisement; that he never sold the goods, but retained them to his own use, till just before the commencement of this suit, when he, with the assent of the defendant, received and accepted them, and hath hitherto retained them, in satisfaction and discharge of the said sum of 6*l*. Thirdly, that after the accruing of the causes of action, and before the commencement of the suit, the plaintiff wrongfully seized the defendant's goods, being of value more than sufficient to satisfy the causes of action in the declaration mentioned, and retained them for an unreasonable time, to wit, nearly two years, and converted them to his own use; and that it was, before the commencement of this suit, agreed between the plaintiff and the defendant, that for the termination of disputes between them concerning the causes of action in the declaration and claims made by the defendant in respect of the said seizure and conversion of the goods, that such demands and rights of action should be mutually relinquished, and that the plaintiff should retain the goods as a final settlement, in full satisfaction and discharge of the said causes of action in the declaration mentioned; and that the plaintiff accepted and received, and hath retained the said goods in such full satisfaction and discharge. Fourthly, as to 6*l*. parcel, &c., in the first and third counts, that before the accruing of the causes of action, to wit, on the 10th of April, 1845, the defendant was tenant to the plaintiff of the said rooms and apartments, and during a certain tenancy which had commenced, to wit, on the 7th of December, 1844, to wit, a tenancy for one month, and from month to month, at the rate of 1*l*. 4*s*. per month, under which tenancy the sum of 3*l*. 12*s*. had become due from the defendant to the plaintiff at the time of the accruing of the said causes of action, for three months' rent, and before the commencement of the suit, the defendant was indebted to the plaintiff in 2*l*. 8*s*., the

residue of the 6*l*., for the meat, necessaries, &c., mentioned in the declaration; that the account in the third count was stated concerning the money in the first count; that after the accruing of the causes of action, and during the tenancy, and just after the expiration of the said first three months, to wit, on the day in this plea first mentioned, the plaintiff wrongfully seized the defendant's goods to the amount of the money in the first count mentioned, and detained them for an unreasonable time, and converted them to his own use, and wrongfully disturbed the defendant in the peaceable possession of the rooms; that the plaintiff was desirous of regaining possession of the rooms, and after the accruing of the causes of action, and before the commencement of the suit, it was agreed between the plaintiff and the defendant, that to put an end to disputes in respect to the said causes of action in this plea mentioned, and other alleged causes of action on the part of the defendant, they should mutually relinquish their claims, and the plaintiff should retain the goods in full satisfaction and discharge of his claims, and that the defendant should relinquish her right to, and give up possession of, the rooms, and that she should be discharged by the plaintiff from all claims; that the defendant accordingly relinquished her claims, and gave up possession during the tenancy, and the plaintiff resumed and hath hitherto retained possession of the rooms, and retained the goods so seized, in satisfaction and discharge of the said causes of action.

The plaintiff replied to the second plea, that the plaintiff did not seize, take, or detain as a distress for the rent, in the second plea mentioned, any goods of the defendant of sufficient value to satisfy the said rent, and the costs and charges of the distress, sale, and appraisement; or out of which the plaintiff might have satisfied the said rent, costs, and charges; in manner and form, &c.

To the third plea, that the plaintiff did not seize, take, or detain any goods of the defendant of value sufficient for

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a full satisfaction and discharge of the said causes of action in the said declaration mentioned, in manner and form, &c.

To the fourth plea, that the plaintiff did not seize, take, or detain any goods of the defendant of the value in the said fourth plea mentioned, in manner and form, &c.

The defendant demurred to the replications to the second, third, and fourth pleas, on various grounds, the principal of which were, that the replications were too large, and traversed immaterial allegations. Joinder in demurrer.

Rew, in support of the demurrer. The second plea is substantially one of accord and satisfaction, but in the inducement an allegation is introduced as to the manner in which the goods in question came into the possession of the plaintiff. The manner in which they came into his possession was quite immaterial. He might have taken them as a distress, or he might have received them when delivered to him by the defendant. If they were retained in satisfaction by the plaintiff, the plea would be substantially proved. The replication, however, traversed the fact of the distress as well as the value of the goods in question. Both facts were quite immaterial to the validity of the plea. It was laid down in *Stephen on Pleading*, p. 269, 4th ed., "that a traverse must not be taken on an immaterial point." In *Thurman v. Wild* (a), a defendant in trespass pleaded that the trespass was committed by command of a third person, and then stated an executed accord between the plaintiff and the third person, "with the consent of defendant," and acceptance thereof by plaintiff in satisfaction of the trespasses. The Court held a replication which made the consent of the defendant part of the issue to be bad, as no rights of the defendant were compromised by the accord, and, consequently, his consent was unnecessary. So in *Basan v. Arnold* (b), the Court

✓(a) 11 A. & E. 453; S. C. 3 P. & D. 289.

✓(b) 6 M. & W. 559; S. C. 8 Dowl. 356.

held a replication which put in issue the fact of the plaintiff's being holder of a bill of exchange at the time of pleading, as well as at the commencement of the suit, to be bad. And in *Tempest v. Kilner* (a), the Court held a plea bad as tendering too large a traverse, which put in issue the readiness of the plaintiff to accept a transfer not only at the time of making an agreement, but also from that period down to the time of bringing the action. In the case of *Eden v. Turtle* (b), where the Court decided that a traverse was not too large, *Parke, B.*, said, "I quite agree, that if the effect of this replication were to compel the defendant to prove more than he otherwise would have been bound to do in order to support his plea, it would be bad." Here, if the defendant had joined issue instead of demurring to the replication, he would be compelled to prove that which was quite immaterial to his defence. Then, with respect to the allegation as to the insufficiency of the value of the goods which were alleged to have been retained in satisfaction. The issue upon that was quite immaterial. Where a chattel was taken in satisfaction of a pecuniary demand, the value of the chattel was quite immaterial. In *Sibree v. Tripp* (c), it was held that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount. There *Parke, B.*, referred to *Co. Litt.* 212, b, where it was laid down, that "the obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater: but if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole" (d). So a sum of money payable

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✓(a) *Ante*, vol. 3, p. 407; S. C. 2 C. B. 300.

✓(b) 10 M. & W. 635, 639; S. C. 2 Dowl. 459, N. S.

✓(c) 15 M. & W. 23, 34.

(d) The passage cited by the learned Baron is from the Commentary of Sir *Edward Coke*. In the text of *Littleton*, to which the Commentary is subjoined,

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at a different time is a good satisfaction of a larger sum payable at a future day; *Com. Dig.* tit. "*Accord*," (B 2). Besides, the replication was open to the objection of amounting to a negative pregnant; and in *Com. Dig.* tit. "*Pleader*," (R 5), the cases there collected shewed that an issue on an immaterial allegation rendered a pleading obnoxious to the objection, that it amounted to a negative pregnant. With regard to the replication to the third and fourth pleas, the same objections might be urged against them.

Lush, *contra*. The authority of the cases cited on the other side, as well as the general principles laid down, were admitted. The third and fourth pleas, however, were bad, and if the second plea were held to be good, the replication to it must be equally good. The second plea professed to be one of accord and satisfaction, but it did not allege any satisfaction, for it did not shew that the goods were delivered by the defendant to the plaintiff in satisfaction. Nothing here disclosed that the defendant was any party to the delivery of the goods to the plaintiff. [*Maule*, J.—Is it not sufficient to shew that the goods were accepted in satisfaction? Here it is alleged that the goods were somehow in the possession of the plaintiff, and he accepted them with the assent of the defendant. That is the same as a delivery to him. *Wilde*, C. J.—The plaintiff accepted with the assent of the defendant. That implies a delivery. *Maule*, J.—The material part of the plea is, that the plaintiff accepted the goods with the assent of the other party.] Then there is no satisfaction alleged. This is different from a case where a chattel, no matter of what value, is delivered in satis-

there is this passage: "also in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as

if he had received the sum of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction."

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faction; for here there was a prior right to the goods under the distress. [*Maule, J.*—All that he had was a right to retain the goods and sell them, subject to certain formalities; but the agreement was that he should have a right to sell as the owner.] The plaintiff having the goods lawfully in his possession, and having a lien upon them, it would be no answer to the action to shew the agreement to retain the goods in satisfaction, without also shewing them to be of value equal to the amount of rent due. The value then would become material, and the replication in traversing the value was correct. [*Wilde, C. J.*—You argue as if things had no other value than a pecuniary one. But if a person thinks proper to become the owner otherwise than by sale, he may make an agreement to that effect.] The third and fourth pleas set up facts which the authorities shewed did not amount to a good accord. Those pleas stated that the plaintiff wrongfully took certain goods, and converted them to his own use; then, that the defendant being indebted to the plaintiff for certain rent, a mutual arrangement was made. That was, that the defendant had a right of action against the plaintiff, and the plaintiff had a right of action against the defendant, and that it was then agreed that both should be quit of each other in respect of their mutual rights of action. This arrangement, according to the authorities in *Com. Dig.* tit. "*Accord*," (B 1), was insufficient; 1 *Roll.* 128, l. 40; *Lutw.* 57. There, it was laid down, that it is not a good accord "that the plaintiff and defendant should be quit of actions against each other." No doubt the pleas proceeded to state that the agreement was, that the plaintiff should keep the goods of the defendant; that, however, was only another mode of stating that each party agreed to forego his legal right of action.

WILDE, C. J.—The pleas allege more than that, for they state that the defendant gave up his property in the goods that had been seized. As the pleas allege the seizure to have been wrongful, the property in the goods still remained

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in the defendant, and he might have retaken them at any time.

MAULE, J.—Where a chattel of one person is wrongfully seized by another, there is no objection to the former selling the chattel.

PER CURIAM.

Judgment for the Defendant.

J. C. S. C. B. 283.

MAYBURY v. MUDIE.

Where a plea in abatement was supported by an affidavit of verification, which disclosed the place of business, but not the place of residence, of an alleged co-contractor with the defendant; the Court set it aside, on the ground that it did not comply with the provisions of the 3 & 4 Wm. 4, c. 42, s. 8.

Whether the affidavit does, or does not, state the true place of residence, is a matter which may be controverted and determined by the Court on motion.

SCOTT shewed cause against a rule obtained by *Meymott*, for setting aside a plea in abatement, on the ground that the affidavit of verification required by the 3 & 4 Wm. 4, c. 42, s. 8, had not been delivered with the plea. It was an action of debt for work and labour and on an account stated. The defendant pleaded in abatement the non-joinder of nine alleged co-contractors as co-defendants. An affidavit was made as to the residences of the parties therein named, with respect to one of whom the affidavit stated "James Elkington Boord, mentioned in the said plea, resides at Bath, in the county of Somerset," and as to another, "Robert Denton, mentioned in the said plea, resides at No. 89, Leadenhall Street, in the city of London." In support of the rule, it was sworn that Boord was not then resident at Bath, and that the premises at No. 89, Leadenhall Street, were occupied by one Charles Bremmer, and that no person named Denton had resided there for the last two months. It was now sworn on the part of the defendant, that just before pleading the plea, one of the deponents called at No. 89, Leadenhall Street, where he had frequently seen Denton and found the name in large letters still over the door; that he inquired of Bremmer, who was in the shop, and whom he believed to be the shopman, whether

Denton was within; the answer was, that he was not, and it was uncertain how long he would be absent; that at that time Bremmer did not suggest that Denton did not still occupy the house, and on a subsequent occasion, when pressed as to whether Denton still resided there, he declined to answer and appeared confused. With respect to Boord, it was stated, that he had lately removed to Bath, and given that as his residence to the deponent; that notwithstanding the inquiries, the exact address of Boord had not been obtained, but he had been lately seen at Bath; and that the plaintiff as secretary to the company, of which the co-contractors were members, knew his address. It was submitted, that although the statute 3 & 4 Wm. 4, c. 42, s. 8, required the residence of co-contractors to be "stated with convenient certainty," those words must be construed with reference to the particular circumstances of the case, and could not require more than reasonable efforts on the part of the defendant to discover the real address of the co-contractors. Every effort had been made on the part of the defendant to ascertain the real address both of Denton and Boord, and the address given was the one which he bonâ fide believed to be the true one. It was doubtful, whether the Court would allow the question as to the correctness of the residence stated in the affidavit to be discussed on affidavit. The cases of *Newton v. Stewart* (a), *Lambe v. Smythe* (b), *Wheatley v. Golney* (c), were not necessarily authorities to shew that the Court would permit that question to be raised on affidavit. On these grounds, the Court would not be disposed by a severe construction of the statute, to deprive the defendant of the benefit of his plea.

Meymott, in support of the rule, contended that the cases cited on the other side were clear authorities to shew that the Court would permit the affidavit of verifi-

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✓ (a) *Ante*, vol. 4, p. 89.

3 D. & L. 712.

✓ (b) 15 M. & W. 433; S. C. ✓ (c) 9 Dowl. 1019.

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cation to be controverted by affidavit. It appeared then that the residence of two of the persons mentioned in the plea was incorrectly stated. If so, the defendant had not complied with the provisions of the statute. The fact of his finding a difficulty in discovering the residence of the alleged co-contractors, or his bona fides, in stating what he believed to be the true residence, could make no difference. The present rule ought therefore to be made absolute.

Cur. adv. vult.

MAULE, J., delivered the judgment of the Court.—This was a motion to set aside a plea in abatement for nonjoinder, on the ground of the alleged insufficiency of the affidavit verifying the plea. The argument took place in the course of the last Term, before the Chief Justice, my Brother *Williams*, and myself. The Court took time to look into the cases. The ground of the application was, that the 3 & 4 Wm. 4, c. 42, s. 8, had not been complied with. That section provides, “that no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.” The question on which the Court entertained some doubt was, what was the proper construction of the latter part of the clause.

Two cases were cited, *Wheatley v. Golney* (a), and *Lambe v. Smythe* (b), where, however, the matter does not appear to have been much considered; and also a third case of *Newton v. Stewart* (c), where the point was expressly decided by my Brother *Wightman*. Upon a careful review of these cases, we have come to the conclusion that the affidavit must state the true place of abode of the party whose non-

✓ (a) 9 Dowl. 1019.

✓ (b) 15 M. & W. 433.

✓ (c) *Ante*, vol. 4, p. 89.

joinder is objected to, and that whether it does so or not, is a matter that may be controverted and determined by the Court on motion. Before the statute the law was, that the plea must be accompanied by an affidavit stating that it was true in substance and in effect, it being a dilatory plea, and that being required in all dilatory pleas. The statute did not alter the plea, except in requiring it to state that the person was resident within the jurisdiction of the Court. Now, there was nothing in the affidavit required before the act, which was not also stated in the plea. There was no allegation in it that might not be put in issue. But the provision of the act in question is a requisition which applies to the affidavit only. The residence must be stated in the affidavit, but need not be stated in the plea, and cannot, consequently, be put in issue by the replication. It would, therefore, be binding on the party if it could not be controverted in the manner proposed; and the question therefore is, whether the Legislature meant the allegation to be binding on the plaintiff. Certainly, if the matter of the plea were not true, the defendant would fail, and the plaintiff would obtain judgment; and a doubt was raised on the argument, whether any thing more was required than that the defendant should pledge his oath to the truth of the allegation. We think the object of requiring the statement is to enable the plaintiff to sue the party, and unless he gets the true residence, that object would not be attained. It is true that the defendant may be certain that the party is within the jurisdiction, and yet may not be able to find his true residence; and then he will be deprived of the plea. But pleas in abatement are not to be favoured, and we think the Legislature intended, that if the defendant is so situated that he cannot point out to the plaintiff the residence of the party who, he says, is within the jurisdiction, he ought to be deprived of the benefit of the plea. Otherwise, the plaintiff would be no better off. We think the words of the section do support that construction. Then, what does the place of residence mean? It means

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that particular place where, in fact, the person is residing, and the statute is not complied with unless the true place is stated. Taking that to be the true construction, and that the matter may be inquired into upon affidavits, it follows, that if it turns out that the true place of residence is not stated, the plea ought to be disallowed. This affidavit appears to have been made in good faith. The place was one where the party might reasonably be found and met with. It was where he carried on his business. But still we think that is not his residence. It would not do for the service of a writ, which, it is well known, must be at the place of residence of the party. Consequently, the plea ought to be disallowed. But, considering that the defendant may have been misled, we think, in making the rule absolute, it should be on condition that the defendant be at liberty to plead in bar within a week.

Rule absolute accordingly, without costs.

S. C. 2. Ch. 271.

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Notwithstanding the provisions of the 8 & 9 Vict. c. 109, s. 18, a sum deposited with a shareholder to abide the event of a trotting match, may be recovered by the depositor, who has repudiated the wager and demanded his money before the match is decided; and *semble*, that in order to raise the objection on the section, it ought to be pleaded specially.

TALFOURD, Serjt., and *Phinn*, shewed cause against a rule obtained by *Byles*, Serjt., for a new trial, on the ground of misdirection. It was an action of debt for money had and received, and the only plea was never indebted. The action was brought to recover a sum of 20*l*. which had been deposited by the plaintiff with the defendant as a stakeholder, to abide the event of a trotting match. On the occasion of making the bet, the following memorandum was drawn up:—

“ March 25th, 1846. Mr. Varney bets Mr. Isaacs 20*l*. that his horse will make the best of his way for two miles against

Mr. Isaac's horse. Mr. Varney to have the same horse that he used when Mr. Hickman rode with him to the coursing match at Hampton. Each horse to draw ten hundred weight besides the carriage. The match to come off on Monday, the 30th of March, 1846. The horse to have been the property of Mr. Isaacs for the last eighteen months. The match to come off on the Uxbridge road.

(Signed)

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"The money to be deposited with Mr. Hickman on or before the 28th of March, 1846. Witness to 1L having been staked on both sides for the completion of the above match.

(Signed) SAMUEL ELLIS; J. HICKMAN for MR. ISAACS."

A sum of 20L was then deposited by each of the parties with the defendant, in pursuance of the above arrangement. Some time afterwards, and before the time at which the match was to take place, the plaintiff gave notice to the defendant that he withdrew from the wager, and required his deposit money to be refunded to him. This was refused, and, on the appointed day, the plaintiff not appearing at the place for trotting the match, Isaacs attended and walked over the ground. The defendant then paid over the amount of the two deposits to Isaacs, and the present action was brought to recover the plaintiff's deposit. At the trial it was objected, on the part of the defendant, that as the wager was rendered illegal by the provisions of the 8 & 9 Vict. c. 109, s. 18, the plaintiff could not recover. *Wilde*, C. J., before whom the cause was tried, overruled the objection, and the plaintiff had a verdict for 20L. It was submitted that the ruling of the Chief Justice was correct. The words of the section in question were inapplicable to a case like the present. The language of the section was this: "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained

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in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." What the general object of the act of Parliament was, appeared by the words of the preamble. They were, "whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill, from which the like mischiefs cannot arise." Construing the section with reference to the preamble, the clear meaning of it was that the Legislature intended to prevent a party who had won a wager from recovering the sum so won. Perhaps this intention might have been sufficiently expressed by the words "that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager;" but the succeeding words, "or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," did not add to the meaning of the former words. It never could have been intended by the Legislature to prevent those who had made a wager from repudiating it before the time for its decision had arrived. Such a construction would be clearly contrary to the avowed object of the statute, since it would compel a person who had hastily made a wager to continue it. If even the language of the provision was general, it would be restrained by the expressed intention of the Legislature. In *Bac. Abr.* tit. "*Statute*," (I 5), it was laid down, "such construction ought to be put upon a statute, as may best

answer the intention which the makers had in view." In *Crespigni v. Wittenoom* (a), the Court, in the construction of the Annuity Act, 17 Geo. 3, c. 26, had recourse to the preamble in order to determine what construction should be put upon the enacting clauses of the statute. [They referred also to *Green v. Wood* (b)]. But, supposing that the clause in question afforded any answer to the action, it must be on the ground of illegality, and that could only be rendered available if specially pleaded, and could not be successfully urged under the plea of never indebted; *Potts v. Sparrow* (c). In *Martin v. Smith* (d) it was held, that a defendant could not, under non assumpsit, set up the illegality of a wager for which the action was brought.

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Byles, Serjt., *Parry*, and *Joyce*, appeared in support of the rule. Antecedent to the statute 8 & 9 Vict. c. 109, whether the wager was legal or illegal, the deposit might be recovered, if notice of repudiating the wager was given before the wager was decided. The effect, however, of the 8 & 9 Vict. c. 109, s. 18, was to put the law on a very different footing. The Legislature appeared to have three objects in view. First, to prevent any action which depended in any way upon wagers or wagering contracts, whether the event had or had not occurred, or notice of repudiation had or had not been given; secondly, to afford protection to stakeholders in every case; and thirdly, to inflict a penalty upon every person who deposited a sum which was to abide the event of a wager. This construction best effectuated the intention of the Legislature to restrain unlawful gaming. The language of the section was exceedingly general, and was in strict conformity with the generally expressed object of the Legislature. The statute in this case prevented the plaintiff from ever having a cause

✓ (a) 4 T. R. 790.

1 Scott, 578.

✓ (b) 7 Q. B. 178.

✓ (d) 4 Bing. N. C. 436; S. C.

✓ (c) 1 Bing. N. C. 594; S. C. 6 Scott, 268; S. C. 6 Dowl. 639. ✓

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of action; and, consequently, it did not come within the meaning of the new rules of pleading. This was analogous to the case of *Morgan v. Ruddock* (a), where it was held that as the 55 Geo. 3, c. 194, s. 21, prevented an apothecary from recovering if he had not complied with the requisites prescribed by the statute, it was not necessary to plead the statute in order to render it available in answer to the action. The case of *Shearwood v. Hay and Another* (b), was to the same effect. The objection, therefore, was open to the defendant on the plea of never indebted, and if the construction contended for was correct, the plaintiff ought to have been nonsuited.

MAULE, J. (c)—In this case it is contended, on the part of the defendant, that the plaintiff cannot recover in consequence of the provisions contained in the 8 & 9 Vict. c. 109, s. 18. I am of opinion that the plaintiff is entitled to keep the verdict he has obtained notwithstanding this objection; and that if the objection were good, it is not available to the defendant without being specially pleaded. The prior part of the section provides that all contracts or agreements by way of gaming or wagering, shall be null and void. It then proceeds "no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won, nor for any wager;" and then still further provides, "or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Now, the second and third provisions in this section were comprehended in the first, as being the legal consequences of it; but there is nothing unusual in an act of Parliament stating in terms that which would otherwise have been inferred. I do not think, therefore, that this circumstance

✓ (a) 4 Dowl. 311.

✓ (b) 5 A. & E. 383.

✓ (c) *Wilde*, C. J., was sitting atnisi prius, and *Coltman*, J., had gone to Chambers.

should have much weight in construing the statute. Then as to the third clause it is said that it would be useless, as being no more than the legal consequence of the first, unless it was construed as having the further effect of depriving a party of his right to recover a deposit under a repudiated wagering contract. I think, however, that if the second part of the section is considered, it is more reasonable that the third part should be considered as only an exposition of the legal consequence of the first. It appears to me that the second clause relates to a case in which a winner brings an action against a loser to recover the amount of the loss. The third clause might have been omitted, but if the second was inserted, then it became necessary to insert the third. I think, therefore, that treating the question as one of grammatical construction, this section does not apply to the case of a repudiated contract such as the present. But this construction, I am of opinion, can be supported on a still higher ground. The present action, it appears to me, cannot be considered as one brought to recover a sum of money or valuable thing deposited in the hands of any person to abide the event on which any wager shall have been made; for here, the money is claimed because it belongs to the plaintiff, and the defendant holds it for him, and is under no obligation to pay it over to any body else. After notice of repudiation, it ceased to be money in the defendant's hands to abide the event of a wager, and became money in his hands belonging to the plaintiff, which the defendant had no good cause to retain. It has been contended that the object of the act was to prevent gaming, and for that purpose to impose a penalty upon every party making a deposit, by preventing him from recovering it back; and, therefore, that the plaintiff ought not to recover. I do not, however, think that it is a reasonable supposition that the Legislature intended to impose so severe a forfeiture. But, supposing that the true construction of this section is, that the plaintiff is thereby

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deprived of his right to recover back his stake, then I think such a defence ought to be specially pleaded; although in the present case it is not necessary to pronounce any decision on that point.

CRESSWELL, J.—I am of opinion that the language of this act does not apply to the case now before the Court. It may be difficult to decide whether the latter clauses of the section were introduced *ex abundanti cautela*, or are simply superfluous. However, on examining the general scope of the act, I am of opinion that it leaves a claim to a deposit under a repudiated wager, as it was at common law; and, consequently, that the plaintiff is entitled to recover. With respect to the other question as to pleading specially, I think, though it is unnecessary to decide it in the present case, that this defence on the ground of illegality ought to be specially pleaded, in order to render it available.

WILLIAMS, J., concurred.

Rule discharged. (a).

(a) This case was decided at the sittings in banco after Michaelmas Term.

COURT OF EXCHEQUER.

Michaelmas Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

ROBERT v. LEWIS.

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ACTION on the case. The declaration alleged that the plaintiff was indebted to one Levy in the sum of 36*l.*: that Levy, by the defendant as his attorney for the recovery of the said sum of 36*l.*, sued out of the Court of Exchequer a writ of summons, and thereupon afterwards proceeded to declare against the plaintiff; and that after declaration and after the passing of the act for amending the law of insolvency (7 & 8 Vict. c. 96), the plaintiff presented his petition for protection from process to the Court of Bankruptcy; and that a final order was made by the said Court for the protection of the person of the plaintiff from being taken in execution under any process in respect of any of the debts due at the time of filing the said petition; of which the defendant had notice. It then further averred that the defendant well knowing the premises, and that the

The declaration in an action on the case alleged that the plaintiff being indebted to L. in 36*l.*, he, by the defendant as his attorney, sued the plaintiff; and that after declaration, the plaintiff petitioned the Court of Bankruptcy, under 7 & 8 Vict. c. 96, and obtained a protection from process, of which the defendant had notice. Yet the defendant, well knowing the premises, but wilfully and maliciously intending, &c., procured judgment to be signed against the plaintiff, and sued out a ca. sa., under which the sheriff arrested the plaintiff: *Held*, that the declaration was not sufficient, and that it ought to have alleged that the arrest was without reasonable or probable cause.

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person of the plaintiff was protected from being taken in execution under any process whatsoever, for or in respect of the said debt so due to the said Levy; but wilfully and maliciously intending to injure the plaintiff, &c., after the making of the said final order, procured judgment to be signed against the plaintiff in the said action; and wilfully and maliciously intending to injure the plaintiff, &c., sued out of the said Court a writ of *capias ad satisfaciendum*, under which the sheriff arrested the plaintiff, and detained him in custody, &c.

Demurrer upon the ground that the declaration contained no averment of want of reasonable and probable cause.

Willes for the defendant. The declaration is bad for omitting to aver that the proceedings in the action, after the now plaintiff had obtained his final order for protection, were without reasonable or probable cause; *De Medina v. Grove* (a). [*Parke*, B.—Has the judgment creditor any other method of testing the validity of a final order than by taking his debtor in execution?] The question might then be raised upon an *auditâ querelâ*. [The Court here called on]

Lush, for the plaintiff. It was consistent with the averments in *De Medina v. Grove*, that the money paid might have been intended in satisfaction of some other debts, and that a part of the judgment debt might still be due. In this case no circumstances whatever can be imagined in which the defendant would have had reasonable and probable cause. [*Parke*, B.—Suppose the defendant had very good reason to imagine the document to be a forgery, or to be void for any other cause?] Such a state of things is sufficiently negatived by the averments in the declaration of the proceedings in the Court of Bankruptcy, of which the defendant is alleged to have had notice.

(a) Since reported, 10 Q. B. 152.

PARKE, B.—No man can be sued for the exercise of his legal right to issue execution upon a judgment, unless it is expressly shewn that he acts maliciously and without reasonable and probable cause. An averment of malice is not sufficient. All the allegations in the declaration may be true, and yet the defendant may have had reason to believe the protection void.

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PER CURIAM (a).

Judgment for the Defendant.

(a) Parke, B., Alderson, B., and Platt, B.

SPOTSWOOD v. BARROW and Another.

J C 1. 24th R. 204.

ASSUMPSIT. The declaration alleged an agreement by the plaintiff to act as the defendants' salesman for one year, to devote the whole of his time to them, and not to be connected with any other house in disposing of their goods, for which the defendants were to pay the plaintiff 200*l.* per annum. It then alleged that the plaintiff entered into the employment of the defendants, and devoted the whole of his time to them for part of the said year, and was not connected with any other house; and was always, until the expiration of the said year, ready and willing, and offered to remain in such employment, and not to be connected with any other house. Breach: that the defendants would not suffer the plaintiff to act as their salesman during the remainder of the year, nor pay him the said sum of 200*l.*

The declaration stated an agreement by plaintiff to act as defendants' salesman for one year; to devote the whole of his time to them, and not to be connected with any other house in disposing of goods; for which defendants were to pay plaintiff 200*l.* for the year. It then averred that plaintiff did enter into defendants' service for part of the

year, and was always during the year ready and willing to remain in such employ, and not to be connected with any other house. Breach: that defendants would not suffer plaintiff to act as their salesman for the remainder of the said year, or pay him the 200*l.*

Plea, as to the not paying the 200*l.*, that, during the year, the plaintiff entered the service of another house, and became connected with such house, in the disposal of their goods. Verification.

Held, bad, upon special demurrer, as traversing argumentatively the plaintiff's readiness and willingness to remain in the employment of the defendants.

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Plea: as to so much as relates to the not paying the plaintiff the sum of 200*l.* &c.; that after the plaintiff ceased to be in the employment of the defendants, and during the said period of one year, the plaintiff entered into the service of another house, &c., and became connected with the said last mentioned house in disposing of their goods, during the year. Verification.

Special demurrer, assigning for causes that the plea neither traversed, nor confessed and avoided the causes of action; and that if it were a traverse, it was an argumentative one, &c.

H. Hill, in support of the demurrer, cited *Aspdin v. Austin* (a); *Dunn v. Sayles* (b). [He was then stopped by the Court, who called on]

T. Jones, to support the plea. The breach to which this plea is addressed is the non payment of the 200*l.* The plea shews that the plaintiff connected himself with another house in breach of a condition precedent to his recovering in this form of action. The plaintiff is bound to shew either actual service, or that which is equivalent to it. Here the plaintiff has not done so. [*Parke, B.*—Is not the breach of the promise on his part not to connect himself with another house, the subject of a cross-action rather than a condition precedent? Could it be said that if he sold a yard of cloth for another house he would forfeit his whole salary?] The real consideration for the payment of this amount of salary may have been that the plaintiff should be kept out of the hands of any other house. Then this plea is not an argumentative traverse of the readiness and willingness to serve, but it confesses the declaration and avoids it by new matter.

PARKE, B.—The plaintiff is entitled to judgment. The

/ (a) 5 Q. B. 671.

/ (b) 5 Q. B. 685.

plea amounts to an argumentative denial of the plaintiff's readiness and willingness to serve the defendants. It attempts to shew that the plaintiff could not be ready and willing to serve the defendants in the manner mentioned in the declaration, because he had connected himself with another house. The plea could only be good upon the assumption that it amounts substantially to a denial of the plaintiff's readiness and willingness; and if that is so, it becomes open to the formal objection of argumentativeness which is specially pointed out by this demurrer.

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ALDERSON, B.—This plea appears to me to be an argumentative denial of the plaintiff's readiness and willingness to serve. The defendants should have traversed that averment expressly, instead of attempting to negative it indirectly, by alleging that the plaintiff entered the employment of another house, and became connected with that house in the disposal of their goods. If that allegation be true, it would follow argumentatively that the plaintiff could not be ready and willing to continue in the service of the defendants in the manner agreed upon.

PLATT, B., concurred.

Judgment for the Plaintiff.

LEY v. BARLOW.

L. C. 1. 12th R. 800

THIS was an action brought by the plaintiff as allottee of shares in a railway company against the defendant, who was one of the committee of management, to recover back

In an action by the allottee of railway shares against a managing director for the recovery

of his deposit, the Court made absolute a rule for the plaintiff or his attorney to have liberty to inspect and take copies of the subscribers' agreement and parliamentary contract; upon an affidavit stating that the agreement and the contract had been signed by both the plaintiff and the defendant, and that they were in the hands of the defendant or his attorneys, and that the plaintiff could not safely frame his case or go to trial without such inspection and copies; notwithstanding that the defendant's attorneys claimed a lien on such deeds for their charges against the company.

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the deposit paid by the plaintiff on his shares. It appeared by the plaintiff's affidavits that the defendant was one of the committee of the Grand Junction and Midland Union Railway Company, and had executed the parliamentary contract and subscribers' agreement, both as a shareholder in the company, and as a member of the committee of management; and that the plaintiff himself had executed the same deeds as a shareholder. It also appeared that the said deeds were in the possession either of the defendant and the rest of the said committee, or of the defendant's attorneys, as attorneys of the said company, and that the said attorneys claimed a lien on the suit for their bill against the company; that it would be essential to the plaintiff's case to shew the defendant to be a party to these deeds, and that the plaintiff could not safely proceed in the cause, without inspecting and having copies of them. The affidavits on the part of the defendant deposed that he was not a party to the deeds otherwise than as the plaintiff himself was, and that the deeds were not in his custody. Upon these affidavits,

Willes having obtained a rule calling on the defendant and his attorneys to shew cause why the plaintiff should not be at liberty to inspect and take copies of the deeds.

Brammoell shewed cause. The only cases where the Court will interfere are, where there is a written agreement between two parties, of which there is but one copy, but in which the parties have a common interest; or where the defendant is a trustee for the plaintiff. Here there is no agreement or covenant between the plaintiff and the defendant; there is no stipulation that the deed shall be produced, and the defendant is not a trustee for the plaintiff. In addition to this, the attorneys for the defendant, who are also attorneys for the company, claim a lien on the deeds as attorneys for the company. It has been held that a person is not bound to produce a deed under a subpoena

duces tecum, if he has a lien upon it against the party who requires him to produce it; *Kemp v. King* (a).

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Willes, in support of the rule, was stopped by the Court.

PARKE, B.—Whoever holds such deeds as these, holds them for the benefit of the entire company, and ought to allow any subscriber to inspect them. With respect to the lien of the attorneys, they will not be deprived of it by the production of the deeds which they will still retain. It was decided in *Hunter v. Leathley* (b), that a broker having a lien on a policy which he has effected, may nevertheless be compelled to produce it as evidence for the assured, in an action brought by the latter against the underwriters. *Steadman v. Arden* (c) is exactly in point.

POLLOCK, C. B., ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

✓(a) 2 Moo. & R. 437.

ante, vol. 4, p. 16. See also *Shaw*

✓(b) 10 B. & C. 858.

v. Holmes, 3 C. B. 952. ✓

✓(c) 15 M. & W. 587; S. C.

The GOVERNOR and COMPANY of the BANK of SCOTLAND
v. FENWICK.

(Before Rolfe, B., sitting alone.)

S.C. 1. - Exh. 792.

WILLES had obtained a rule requiring the plaintiffs to shew cause why the writ of scire facias obtained by the plaintiffs against the defendant, should not be quashed.

A writ of scire facias on a judgment recovered against a public officer

of a banking company, under the 7 Geo. 4, c. 46, alleged that C. S. F., "at the time of the commencement of the said action in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment was, and from thence continually has been, and still is, a member of the said co-partnership." The writ having been issued without the leave of the Court; the Court quashed it, on the ground that the plaintiff might obtain execution under it against the said C. S. F., as being a member at the time of judgment recovered," although the leave of the Court to issue the writ had not been obtained.

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The writ recited a judgment obtained by the plaintiffs against George Burdiss, one of the public registered officers of the North of England Joint Stock Banking Company, in an action on promises for 66,536*l.* 7*s.* 2*d.*, and that although judgment was given in such action, yet execution of the said damages still remained to be made to the said governor and company of the said Bank of Scotland, and it then proceeded in the words following: "And that Cuthbert Smith Fenwick, at the time of the commencement of the said action in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment was, and from thence continually has been, and still is, a member of the said co-partnership, called 'The North of England Joint Stock Banking Company;'" and it then proceeded to cite the said Cuthbert Smith Fenwick in the usual form before the Barons of the Exchequer, to shew cause why execution should not issue against him. "Witness, Sir Frederick Pollock, Knight," &c. It appeared that no leave of the Court had been obtained for issuing the writ.

Sir *J. Bayley* shewed cause. The other side will rely on *Esdaile v. Trustwell* (a), but, in fact, there was no decision in that case, the plaintiff having elected to amend. It will also be said that the leave of the Court is necessary to issue a *scire facias* against a man upon the ground that he was a member at the time when the writ issued, but here it is alleged that he is still a member, and the leave of the Court is wholly unnecessary in such a case. If it had appeared either on the face of the writ or by affidavit that this defendant had ceased to be a member, the leave of the Court would have become necessary, but it is not so here.

Willes, contra. It is quite clear that in cases where the obtaining the permission of the Court is a necessary

(a) *Ante*, p. 219.

preliminary to issuing a scire facias, the neglecting to do so is an irregularity for which an application must be made to quash the writ, and it is not matter which can be pleaded in bar; *Bradley v. Warburg (a)*. In the present case the defendant would have to take issue in the disjunctive upon the allegations in the declaration, which would follow the writ in its terms. He would have to deny both the averments in the disjunctive; and if the plaintiffs succeeded on either of them, they would be entitled to judgment. In the event of the plaintiffs' success in shewing that the defendant was a member at the time of the judgment, though he had ceased to be so, the plaintiffs would be entitled to their judgment, though in that case they would have issued a writ requiring the leave of the Court, without having obtained such leave. There may be some doubt as to the meaning of the words in the statute "member for the time being;" but whether they mean "member when the writ issued," or "member at the commencement of the suit," the objection to the present writ is equally applicable. *Esdale v. Trustwell* is exactly in point.

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ROLFE, B.—I think *Esdale v. Trustwell* governs the present case. The statute 7 Geo. 4, c. 46, gives a plaintiff power to issue a scire facias, without leave of the Court, against any member for the time being of the co-partnership against whose public officer he has obtained judgment. There may be some doubt upon the construction of the words "member for the time being;" but, at all events, they point to a membership at a time different from that of the judgment recovered. This is equally so whether they mean a member at the time of the writ issued, or at the time of the commencement of this suit. I think it makes no difference, and will therefore assume, for the purposes of this case, that it means at the time the writ issues. The act of Parliament also enables the plaintiff to issue his

/(a) 11 M. & W. 452; S. C. 2 Dowl. 1059, N. S.

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execution against persons who were members of the company at the time of his judgment recovered; but to give him a right to issue his writ upon that ground, the previous leave of the Court is required. In this case the writ describes the defendant as a member of the co-partnership for the time being, and also at the time of the judgment recovered. The declaration would follow the form of the writ, and no objection could be taken to the declaration either by demurrer or plea in bar, on the ground that there was no leave of the Court to issue the writ. The defendant would be compelled to traverse it, and his traverse must be in the disjunctive "that he was not a member at the time of the judgment recovered, *or* a member for the time being." If he should fail upon either part of the traverse, the plaintiffs would obtain their execution; so that if the defendant should be proved to be a member at the time of the judgment recovered, although not for the time being, the plaintiffs would be entitled to their execution, though they had issued their writ without that leave of the Court which is required by the statute.

Rule absolute (a).

✓(a) See *Ricketts v. Bowhay*, 3 C. B. 888.

S.C. 1. Feb R. 644

THOMPSON v. UNIVERSAL SALVAGE COMPANY.

The declaration alleged that the defendants were a joint stock company, having obtained a certificate of complete registration; that P. and L.

then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay the plaintiff or order 32l. 4s. 9d., the balance of account due to him from the company three months after date, which note was signed by the said P. and L., and made by them and in their names, and on behalf of the said company, and countersigned by the secretary of the company; and thereupon the defendants, in consideration of the premises, promised the plaintiff to pay him the said note: *Held*, that the declaration was insufficient, and did not shew any authority in P. and L. to bind the company.

b. Feb R. 271.

ASSUMPSIT. The declaration alleged that the defendants, before and at the time of the making of the promissory note hereinafter mentioned, were a joint stock company, completely registered, by the name of the Universal Salvage Company, and had before that time obtained a certificate of complete registration, according to the form and effect of

statute 7 & 8 Vict. c. 110; that afterwards Samuel Price and Christopher Lund, then being two of the directors of the said company, made their promissory note in writing, and thereby promised on behalf of the said company, to pay to the plaintiff or order the sum of 32*l.* 4*s.* 9*d.*, the balance of the plaintiff's account due from the said company, three months after the date of the said note, which said promissory note was then signed by the said Samuel Price and Christopher Lund, and was then made by them and in their names on behalf of the said company, and then was and is expressed by them to be made on behalf of the said company, and was then countersigned by the secretary of the said company; and thereupon, to wit, on the same day and year aforesaid, the said company, in consideration of the premises, then promised the plaintiff to pay him the amount of the said promissory note, according to the tenor and effect thereof.

General demurrer.

The defendants' grounds of demurrer were, among others, the following. Because it is stated that Price and Lund made their promissory note, and the subsequent averment that the company promised to pay the amount thereof cannot be supported; for, if such promise be an inference of law, it is not warranted by the premises, and if it be an averment of a fact, there is no sufficient consideration for the promise; because the company can only be charged in respect of such a note by statute, and it is not averred that the promise of the company was by virtue of any statute: that if the note be in legal effect the note of the company, the averment should have been that the company made their note, and not that Price and Lund made their note, which the company promised to pay; and, on the other hand, if the note be properly described as the note of Price and Lund, then, in order to make the company liable to pay such note, it ought clearly to appear that it was a note made according to the provisions of statute 7 & 8 Vict. c. 110, and that the persons who made it, had

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authority to bind the company by such a note; because, for such purpose, it ought to be shewn that there was a deed of settlement of the company by which the company were empowered to make and issue promissory notes; and that it does not appear that the requisites of the statute have been complied with so as to cast the liability on the company; and that the declaration is not framed in accordance with the provisions of the statute.

The plaintiff's points were, that it sufficiently appears that the promissory note was made and signed conformably with the statute 7 & 8 Vict. c. 110, and that all the requisites thereby prescribed with regard to making promissory notes appear to have been complied with.

Montague Smith, in support of the demurrer. The declaration is bad on several grounds. It does not shew that the note was made by the company. According to the 7 & 8 Vict. c. 110, s. 45, they ought to shew the authority by which the note was made. [*Parke*, B.—Does the declaration shew any authority whatever in the company to make notes. It does not even aver, as it might have done, any authority in them to make a note.]

Swann, for the plaintiff. The company are bound by the act of their directors, though they may have acted without authority. The 45th section of the act of Parliament points out the manner in which bills or notes are to be drawn, and if they are so drawn, they bind the company. This note appears to have been made in all respects as required by the statute.

PARKE, B.—The argument for the plaintiff is, that even though the directors are not authorized by their deed of settlement to issue bills and notes, yet if they do issue them in the form and manner prescribed by the statute, the company will be bound. That position cannot be sustained. It ought to have been averred either that the note was

made by the company themselves, or that it was made by two directors in pursuance of proper authority, which should have appeared on the face of the declaration. Unless the plaintiff amend, there must be judgment for the defendants.

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POLLOCK, C. B., ALDERSON, B., and PLATT, B., concurred.

Judgment accordingly.

GOODCHILD v. LEADHAM and Another, Executors.

J. C. 1. 2nd K. 706

THE defendants in this case were sued as executors of one George Allen. The action, which was assumpsit, was commenced by writ of summons on the 27th of September, 1847. The defendants appeared, and the plaintiff declared in November. On the 26th of November, 1847, the defendants pleaded non assumpsit to one part of the declaration, and, as to the other, they pleaded plene administravit, and ne unques executors. After these pleas were pleaded, the plaintiff found out that G. Allen, the widow of the testator was, under his will, joint executrix with the two defendants, and that she alone had proved the will, power having been reserved to the present defendants to prove afterwards, if they should think fit. It appeared that the Statute of Limitations would be an answer to any fresh action which could now be brought, but that the cause of action had accrued within six years before the commencement of the existing suit. The plaintiff had applied to Alderson, B., at Chambers, for leave to amend the writ and all subsequent proceedings, by adding the name of G. Allen as a co-defendant; and the learned Judge had made the order accordingly, giving the defendants until the fourth day of this Term to plead, with liberty to apply to this Court.

In an action of assumpsit against two executors, the plaintiff discovered, after plea by the two, that there was a third joint executor. The Court refused permission to amend the writ and declaration by inserting the name of the third executor as co-defendant; although a fresh action would be barred by the Statute of Limitations.

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Petersdorff having obtained a rule nisi to rescind the order,

Martin shewed cause. Unless the proceedings in this action are amended, the plaintiff will be barred by the Statute of Limitations, and will lose his debt. *Brown v. Fullerton* (a), and *Christie v. Bell* (b), have settled the practice of the Court on this matter. The Court there decided, that where the plaintiff would otherwise be barred by the Statute of Limitations, they would make an exception to their general rule against amending process, and would do so in cases where it would have been done before the Uniformity of Process Act. The amendment now sought for would have been made before that act; *Roberts v. Bate* (c); *Carr v. Shaw* (d); *Rutherford v. Mein* (e).

Petersdorff, in support of the rule. The Court has no power to exercise a jurisdiction over a person who is not before them, or to compel a stranger to become a party to an action already brought. [*Alderson*, B.—Is not this a proceeding rather against the testator's estate than against the executors personally, and are we asked to do more than to amend a writ with which the estate has been already served, so as to make it effectual?] There might be great hardship if that view of the case were adopted. *Mrs. Allen* may have paid many creditors while this writ has been pending, of which payments she would not be able to avail herself under a plea of plene administravit, if the writ were amended as proposed.

POLLOCK, C. B.—This rule must be made absolute. The proposed amendment would not, as it seems to me, have

✓(a) *Ante*, vol. 2, p. 251; S. C.
 13 M. & W. 556.
 (b) 16 M. & W. 669; S. C.
ante, vol. 4, p. 690. ✓

(c) 6 A. & E. 778.
 (d) 7 T. R. 299.
 (e) 2 Smith, 392.

been made before the Uniformity of Process Act. The rule as to making amendments, as I have always understood it, is, that whatever would have been done before the Uniformity of Process Act may be done now; but I am of opinion that an amendment of this description, so late in the action, would not have been made then, and ought not to be made now. There is a very great difference between adding a plaintiff and adding a defendant. In the former case, the party comes before us and consents to the proceeding; while, in the latter case, we are asked to compel a person to come in, over whom we have no power.

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PARKE, B.—There was much discussion among the Judges before *Brown v. Fullerton*, and *Christie v. Bell* were decided, and those decisions may be taken to have laid down the rule of practice on this subject. It must not, however, be understood that all the Judges were consulted before coming to those decisions, though several of them were. After great consideration it was determined that we would adhere to the rule come to after the Uniformity of Process Act, not to amend process except in cases where the Statute of Limitations would otherwise operate as a bar, or where the writ differed from the præcipe. The difficulty in my mind, in the present case, arises from doubts whether before that act, and under the old system, this amendment would have been made so late in the cause. In the case of *Rutherford v. Mein* which has been cited, an amendment was made in a capias by inserting the Christian name of a defendant which had been left blank; but it does not appear, from the manner in which that case is reported, whether the amendment was made before or after the declaration. The real question now is, whether this amendment would have been made before the passing of the Uniformity of Process Act. I think it would not. There seems to me to be a great difference between adding a plaintiff at his own instance when he brings himself before the Court, the

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other parties being already before it; and adding a defendant who does not consent, and over whom we have no jurisdiction.

ALDERSON, B.—I am of the same opinion, and I am glad that I reserved the question for the opinion of the Court, because now we shall come to some general rule on the subject. We have to consider what would have been done formerly under the old system. I think that this amendment would not have been allowed, because it would have made too great a disturbance in the case in its present stage. If the application had been made at an earlier stage of the proceedings, it might, perhaps, have been granted. The case of adding a plaintiff is, in many respects, different.

PLATT, B.—The question is, whether the Court is to travel out of the ordinary course of practice in order to introduce a new defendant, and deprive that defendant of the benefit of the Statute of Limitations? It is the fault of the plaintiffs that they have sued two persons only instead of three. They had the means of ascertaining who were executors. I think that even before declaration this writ ought not to have been amended. If we did so now, it would be neither more nor less than to repeal the Statute of Limitations with reference to this defendant.

Rule absolute (*a*).

✓(*a*) See note (*a*) to *Wood v. Hume*, *ante*, vol. 4, p. 139.

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GILES v. HUTT and Another.

A RULE had been obtained, calling on the defendants in auditâ querelâ, to shew cause why an order of Rolfe, B., allowing them to plead several matters therein, should not be rescinded.

S. C. - 1. Exh. 701.

A defendant, in auditâ querelâ, may plead several matters, by leave of the Court; it being "an action or suit," within the meaning of 4 & 5 Anne, c. 16, s. 4.

Peacock now shewed cause. The statute 4 & 5 Anne, c. 16, s. 4, enacts, "that it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any Court of record, with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defence." The question is, whether an auditâ querelâ is "an action or suit" within the meaning of this statute. All the cases shew that it is so. The authorities are all cited in *Turner v. Davies* (a). An auditâ querelâ is the exact converse of a scire facias, and one is as much an action as the other. It has all the incidents of other actions. If the plaintiff is nonsuited, he can commence afresh; *Vin. Abr.* tit. "Auditâ Querelâ." (L 4.) If the defendant dies the writ will abate; *Malyns v. Hawkins* (b). It is an equitable action, and in the nature of a bill in equity; *Bro. Abr.* tit. "Damages," 38; *Oguel v. Randol* (c); 3 *Blackst. Comm.* 405. A scire facias is clearly an action within the statute; *Underhill v. Devereux* (d). In *Shaw v. Lord Alvanley* (e), leave was obtained to plead several pleas in scire facias; and in *Nathan v. Giles* (f), the same leave was obtained in auditâ querelâ. A subsequent section of the statute points out the exceptional cases in which the statute does not apply.

G. Pollock, in support of the rule. The right of pleading

— (a) 2 Wms. Saund. 137, n., 6th ed.

148, n. (1), 6th ed.

— (b) Cro. Eliz. 634.

— (c) Cro. Jac. 29.

— (d) 2 Wms. Saund. 71, n. (4),

— (e) 2 Bing. 325; S. C. 9 B.

Moore, 694.

— (f) 5 Taunt. 558.

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several matters was not discussed in *Nathan v. Giles* (a). The defendant in *auditâ querelâ* is in effect a plaintiff, and to give him the power of pleading double, would be the same as to give the plaintiff in any other action several replications. The statute of Anne does not extend to every possible legal proceeding. In *Phillipson v. Tempest* (b), *Wightman*, J., seems to have had considerable doubts whether the statute extended to *scire facias*. He referred also to *Fitzh. Nat. Brev.* p. 104; *Com. Dig.* tit. "*Auditâ Querelâ*," (E 6).

POLLOCK, C. B.—The question arises upon the enactment of 4 & 5 Anne, c. 16, s. 4, which provides that it shall be lawful for any defendant, "in any action or suit," to plead several matters. The question is, whether an *auditâ querelâ* is an "action or suit." I think an *auditâ querelâ* and a *scire facias* are correlative proceedings. Although Mr. Justice *Wightman* appears at one time to have entertained doubts in *Phillipson v. Tempest*, yet it is clear from his expressions that those doubts were ultimately removed. It has been a long established practice to allow several pleas in *scire facias*, and *Nathan v. Giles* is a strong authority for the same practice in *auditâ querelâ*.

PARKE, B.—I am of the same opinion. The right of pleading several matters which was given by the statute of Anne, is a very convenient one. The words of the statute are quite large enough to include this case. There is no decision to the contrary; and, in the absence of a decision, I see no reason why we should restrain the privilege given by the statute.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged.

✓ (a) 5 Taunt. 558.

(b) *Ante*, vol. 1, p. 209.

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L. C. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

ATHERTON moved for a rule to shew cause why one or the other of the two counts in the declaration should not be struck out, on the ground that they were both founded on the same subject-matter of complaint; and why the plaintiff should not pay the costs of the application.

The declaration was on promises, and contained two counts, the first of which stated, that at the time of the making of the promises in that count mentioned, and from thence until the commencement of this suit, the defendant was the registered holder of fifty shares in a certain railway company, to wit, the Leeds and Bradford Railway Company, being a company incorporated by a certain act of Parliament, intituled, &c.; and thereupon before the commencement of this suit, to wit, on, &c., in consideration of the premises, and that the plaintiff at the request and on the behalf of the defendant had, in the name and on the personal credit and responsibility of him the plaintiff, contracted to sell fifty shares of and in the said railway company, to wit, the said fifty shares, to certain persons unknown to the defendant, and to whom also the defendant was unknown, at and for certain prices in that behalf; to wit, twenty of the said shares, to wit, to one Thomas Hammant, at and for the price of 22*l.* 17*s.* 6*d.* for each and every of the said last mentioned twenty shares; and thirty of the said shares, to wit, to Messrs. Rhodes and Co., at the price of 23*l.* 2*s.* 6*d.* for each and every of the said last-mentioned thirty shares, with all advantages which should accrue in respect of, or be incident to, the said shares respectively; he the defendant then promised the plaintiff, amongst other things, to deliver to the plaintiff all the scrip in respect of all new shares in the said company which should be issued to and received by the defendant in respect of such new

In an action of assumpsit, the first count stated, that in consideration of the plaintiff having, at the defendant's request, contracted to sell to H. certain shares of which defendant was the registered holder, defendant promised to deliver to plaintiff all new shares allotted in respect of the shares so sold, as long as defendant continued to be registered holder, and to indemnify plaintiff from all loss sustained by reason of any breach of the former promise. Breach, that certain shares were allotted to defendant, which he would not deliver, and that by reason thereof plaintiff was obliged to lay out a large sum of money in the purchase of other similar shares in order to fulfil his own contract:

Held, that

such a count might be joined with a count for money paid, and was not an apparent violation of the Reg. Gen., Hil. Term, 4 Wm. 4, Pt. II. r. 5.

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shares, which said new shares should be allotted in respect of the said fifty shares respectively, or any of them, to the defendant, as the registered holder of the said last-mentioned shares, or any of them, to wit, prior to the defendant's ceasing to be the registered holder thereof, under the said contracts of sale; on payment and satisfaction by the plaintiff to the defendant of all payments made by the defendant as such registered holder to the said company in respect of such new shares and of such scrip; and to save harmless and indemnify the plaintiff from all loss, damage, costs and charges which should or might arise or happen to, or be incurred by the plaintiff, for or by reason of the non performance, non observance, or non fulfilment by the defendant, of the said contracts entered into by the plaintiff in manner aforesaid, or either of them, or any part thereof respectively. And the plaintiff in fact saith, that afterwards and whilst the defendant continued to be and was the registered holder of divers of the said fifty shares, to wit, twenty thereof, and before he ceased to be such holder under the said contracts of sale or otherwise, the said railway company allotted to the defendant, as and then being such registered holder, divers, to wit, twenty new shares in the said company of 5*l* each respectively, and twenty other new shares therein of 12*l* 10*s*. each respectively, under and subject to the payment of, to wit, 5*l* in every hundred of the said amounts of the said several new shares so allotted, to wit, the sum of 62*l* 10*s*. by the defendant to the said company, on or before the 20th day of December in the same year; and afterwards, to wit, on, &c., he the defendant having theretofore paid to the said company the said 5*l* in every hundred pounds of the said amounts, to wit, the said sum of 62*l* 10*s*. in respect of the said several new shares so allotted as aforesaid, the said company thereupon then and while the defendant continued such registered holder as aforesaid, issued to the defendant, and the defendant then received from the said company, twenty scrip in respect of the said twenty new

shares of 5*l*. each so allotted as aforesaid, and twenty other scrip in respect of the said twenty other new shares of 12*l*. 10*s*. each so allotted as aforesaid. And the plaintiff further says, that the said sum of 62*l*. 10*s*. so paid as aforesaid, was the only payment made by the defendant as such registered holder as aforesaid to the said company, in respect of such new shares as aforesaid, and of the said scrip; and that the plaintiff hath always, from the time of the allotment of such new shares, been ready and willing to pay to the defendant the said sum of 62*l*. 10*s*., subject whereto the said several new shares were so allotted as aforesaid, and afterwards and within a reasonable time after such allotment, and before the commencement of this suit, offered the defendant to pay him the said sum of 62*l*. 10*s*., and then requested the defendant to deliver to him the plaintiff the said scrip in respect of the several new shares in the said company; of all which the defendant had notice. Yet the defendant disregarded his promise in this, that although a reasonable time from and after the said request, and also from and after the said receipt by the defendant of such scrip, for the delivery of such scrip by the defendant to the plaintiff had elapsed before the commencement of this suit, the defendant did not nor would, when so requested as aforesaid, or at any other time, deliver such scrip or any part thereof to the plaintiff; by means and in consequence whereof the plaintiff was afterwards and before the commencement of this suit, to wit, &c., forced and obliged to expend, and did expend, by reason of the said contract so made by him as aforesaid, and the said neglect of the defendant as aforesaid, divers large sums of money, amounting, to wit, to 710*l*., in and about the purchase of twenty other of the said new shares of 5*l*. each, and of twenty other thereof at 12*l*. 10*s*. each, in order and for the purpose of performing the said contract so made with the said Thomas Hammant as aforesaid, and in and about discharging and satisfying the loss and damages caused by the inability of the plaintiff to perform the said

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contract as aforesaid so made by him on behalf of the defendant as aforesaid, and has lost all interest, gains and profits which he might and otherwise would have made from using the said sum of money so expended as aforesaid. The first count then stated, as a further breach of defendant's promise, that although afterwards the plaintiff gave the defendant notice of the last-mentioned premises, and then requested the defendant to save harmless and indemnify him, the plaintiff, from and against the said sums of money so laid out and expended by the plaintiff for the due performance of the said contract for sale as aforesaid, and from and against all loss and damage in respect thereof. Yet the defendant did not nor would, when he was so requested as last aforesaid, or at any other time, indemnify and save harmless the plaintiff from the said sums of money or any part thereof, or from all loss and damage in respect thereof, but hath wholly neglected and refused so to do; by means whereof the plaintiff hath lost and been deprived of the use of the said sums of money, and of divers great gains and profits, &c.

There was a second count for money paid by the plaintiff for the use of the defendant, at his request.

Atherton. The first count states in effect that the plaintiff, at the instance of the defendant, having sold to Hammant certain shares upon certain terms, and having at the request of the defendant made himself personally liable for the due performance of that contract, the shares so sold being the property of the defendant, and registered in his name, the defendant promised the plaintiff to deliver to the plaintiff all the scrip which should be issued to him the defendant in respect of all new shares which should be allotted to the defendant in respect of the shares sold by the plaintiff for the defendant to Hammant, while the defendant should continue to be the registered holder of such shares; on payment to the defendant of all payments which should be made by him in respect of the said new shares; and that the

defendant further promised the plaintiff to indemnify him from all loss sustained by him by reason of any breach of defendant's promise. The breach is, that although certain new shares were allotted to the defendant he would not deliver them to the plaintiff, in consequence of which the plaintiff was obliged to lay out a large sum of money in buying other new shares, in order to enable him to fulfil the contract with Hammant, for which he had made himself liable on the defendant's behalf. These facts go to shew that the plaintiff has been obliged to lay out money by reason of the breach of the defendant's promise, and upon the faith of an express contract of the defendant to indemnify him. Under such circumstances the defendant would be liable for money paid to the defendant, and the two counts in the declaration are, therefore, for the same cause of action. There is no fact averred in the first count which might not be proved at the trial under the count for money paid. There can be no distinct subject-matter of complaint intended to be established in respect of each of these counts within the meaning of the rules of Hil. Term, 4 Wm. 4, Pt. II. r. 5, 6. *Bayliffe v. Butterworth (a)*, which was decided by this Court last Term, shews that the first count in this case amounts to a count for money paid. In that case the plaintiff was a sharebroker, and had been employed by the defendant to sell certain shares for him. The defendant did not deliver them according to his contract, and the purchaser in consequence purchased a like number of shares in the market at a higher price, and compelled the plaintiff to pay him the difference. It appeared that by the custom of the share-market the selling broker made himself personally liable for the performance of the contract, and it was there held that the plaintiff might recover the difference from the defendant as money paid to his use. In the present case the plaintiff has made himself legally responsible at

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the express request of the defendant, and he has paid money upon that liability, and under an express promise on the part of the defendant to indemnify him.

PARKE, B.—This is not a case of money paid to the use of the defendant. The case of *Bayliffe v. Butterworth* (a) turned upon the custom of brokers, and there is no such custom averred in the present case. The defendant here employs the plaintiff to sell his shares for him, and promises to deliver him all new shares which may be allotted in respect of them so long as they continued to be registered in the name of the defendant, and he also promises to indemnify him against all loss to be sustained in consequence of any breach of the contract which the defendant may commit. This is a very different case from *Bayliffe v. Butterworth*, and these two counts ought to be allowed together.

PER CURIAM (b).

Rule refused.

✓ (a) 1 Exch. 425.

(b) *Pollock, C. B., Parke, B., Alderson, B., and Rolfe, B.*

Sc. 1 Exch. R. 638.

In re WRIGHT.

A rule to strike an attorney off the roll on the ground that he has been convicted of conspiracy, and struck off the roll of the Queen's Bench, is a rule nisi, which will make itself absolute in a certain time, unless the party shews cause to the contrary.

F. ROBINSON moved to strike the name of Mr. Wright, an attorney of this Court, off the roll of attorneys. It appeared by the affidavit on which the motion was made, that Mr. Wright had been convicted of a conspiracy and struck off the roll of attorneys in the Court of Queen's Bench, and the affidavit pledged the belief of the deponent as to the identity of that person with the Mr. Wright who was on the roll of this Court.

POLLOCK, C. B.—We ought not to take so serious a step as this without giving Mr. Wright an opportunity of denying his identity with the person to whom the affidavit refers as having been struck off the roll in the Court of Queen's Bench. You may take a rule to make itself absolute unless cause be shewn in a week.

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PER CURIAM (*a*).

Rule accordingly.

(*a*) *Pollock, C. B., Parke, B., Alderson, B.*

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HOWARD and Another v. BATHO and Others.

On motion to enter up judgment on an old warrant of attorney, it appeared that the warrant of attorney, which was joint, was given to A. B. and C. D., "public officers of the Yorkshire Banking Company," but not to them as public officers. The defeasance shewed that the object of the warrant of attorney was to secure to the plaintiffs, as public officers, money therein expressed to have been lent by them as public officers to defendants, and such further sum as the banking company might advance. The affidavits shewed the original debt to be unpaid, and a further sum to have been advanced by the banking company, but did not allege the debt to be still owing to the plaintiffs, one of them having ceased to be a public officer. The Court permitted the banking company to enter up judgment in the names of A. B. and C. D. as individuals.

The affidavit stated that the deponent believed the defendants to be alive, having seen and conversed with two of them, and "been in company with" the third on a recent day: *Held* sufficient.

REW moved to enter up judgment on a warrant of attorney more than a year and a day old.

The warrant of attorney was joint, and authorized the attorneys therein named to appear for the defendants, and then and there to receive a declaration for them in an action of debt for the sum of 1400*l*. for money borrowed, "at the suit of John Howard and Henry Dresser, both of Leeds, in the said county, public officers of the Yorkshire Banking Company, their executors or administrators," and thereupon to suffer judgment by *nil dicit*, &c. The warrant contained an authority to the said attorneys "to sign, seal, and execute a good and sufficient release in the law to the said John

Howard and Henry Dresser, their heirs, executors, and administrators, of all and all manner of error," &c. The defeazance was as follows: "Whereas the within named James Batho, Richard Beaumont, and James Wood are indebted unto the within named John Howard and Henry Dresser, as public officers of the Yorkshire Banking Company, in the sum of 500*l*. or thereabouts: And the said James Batho, Richard Beaumont, and James Wood, have signed and executed the within written warrant of attorney, as well for securing unto the said John Howard and Henry Dresser, as such public officers as aforesaid, the sum of 500*l*., as also all further sums which may hereafter become due to the said banking company from the said James Batho, Richard Beaumont, and James Wood, on any account whatsoever, not exceeding (together with the said sum of 500*l*.) in the whole the sum of 700*l*., with interest upon the said sum of 500*l*., and all such further sums as aforesaid, at 5*l*. per cent. per annum: It is hereby further declared, that it shall be lawful for the said John Howard and Henry Dresser, or either of them, their or either of their executors or administrators, immediately at any time afterwards, to enter up judgment and sue out execution, and levy for the said sums of 500*l*., and all such further sum or sums as may be due at the time of such entering up as aforesaid, not exceeding in the whole the said sum of 700*l*., together with interest thereon," &c., "and also the costs of," &c. The affidavits shewed the original debt to be unpaid, and a further sum to have been advanced by the banking company, but did not allege the debt to be owing to the plaintiffs; one of them, in point of fact, having ceased to be a public officer of the company.

Res submitted that the affidavits were sufficient; and that as *two* public officers could not sue in the name of the company (*a*), and, consequently, no judgment of which the

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✓ (*a*) See 7 Geo. 4, c. 46, s. 9.

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company could have the immediate benefit could be entered up, the proper course was to enter up judgment in favour of the two officers as individuals, and that they would then become trustees for the company.

ERLE, J., after some hesitation as to whether a warrant of attorney to the public officers would support a judgment by them as individuals, granted the rule, on being satisfied that the application was made on behalf of the banking company.

Rex then mentioned another difficulty which arose on the affidavits. The affidavit to prove that the defendants were alive stated that the deponent "believed (a) the defendants to be alive, having seen and conversed with two of them, and been in company with the third on the," &c., (naming a recent day). He submitted that this was sufficient, notwithstanding the case of *Chell v. Oldfield* (b), and the subsequent case of *Watson v. Mathews* (c), decided on the authority of the foregoing, where it was held that it was not sufficient to state that the defendant has been recently seen, unless the affidavit goes on to say that he has been seen "alive." He contended, however, that the affidavit in this, as in the cases referred to, was inconsistent with any other supposition than that of the defendants having been seen "alive" at the time specified.

ERLE, J.—I have no doubt on the point; for I consider that a person swearing that he was present or in company with A. B., when in truth and within deponent's knowledge, it was A. B.'s corpse, would be guilty of perjury.

Motion granted.

(a) See *Rex v. Pedley*, 1 Leach, C. C. 325.

(b) 4 Dowl. 629.

✓ (c) 2 Dowl. 670, N. S.

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CORNEWALL v. IVES.

THIS was a rule calling upon the plaintiff in error to shew cause why the writ of error coram nobis, issued in this cause, should not be quashed, and all proceedings thereon set aside for irregularity, with costs; or why the allowance of the said writ of error should not be quashed, and all proceedings thereon set aside for irregularity.

By the affidavit in support of the rule, which was made by the clerk of the attorneys of the defendant in error, it appeared that the original action was commenced on the 15th of March, 1847; that proceedings were taken to outlawry, and the defendant in that action outlawed on the 16th of September. That the present writ of error was sued out and allowed on the 20th of November. That the Attorney General's fiat for its issuing was obtained on the 12th of November, on the following affidavit: "Between J. R. Ives, plaintiff, and Herbert Cornewall, defendant. G. Sandys, of," &c., "clerk to Messrs. Beavan and Anderson, attorneys for the above named defendant, maketh oath and saith, that the above named defendant was abroad in foreign parts, and beyond the seas, to wit, at Pau, in the kingdom of France, before and at the time when the writ of exigent was awarded and issued against him in this cause, and that the said defendant remained abroad in the said parts beyond the seas until and at and after the time of awarding and issuing the said writ of exigent." "Sworn," &c. "G. Sandys." That there was no other affidavit to warrant the issuing of the writ of error. That the appearance book of this Court had been searched, and that there was no appearance entered for the defendant in the original action.

The affidavit in answer was made by the above named G. Sandys, who stated that he had had the conduct of the proceedings in this case throughout, as clerk to Messrs. Beavan and Anderson, who were duly authorized by the defendant in the original action to sue out the writ of error,

It is not necessary, in proceeding by writ of error to reverse a judgment of outlawry on mesne process, that there should be an affidavit that the attorney, suing out the writ, is duly authorized by the outlaw.

Nor is it necessary that an appearance by the outlaw should be entered previous to suing out the writ.

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and take the necessary steps to reverse the outlawry in this case.

Martin and *E. Beavan* shewed cause. Two objections are raised: first, that the affidavit on which the writ issued should have shewn that the attorneys suing out the writ were authorized to do so by the plaintiff in error; and, secondly, that the plaintiff in error ought to have entered an appearance in the original action. It is submitted that neither of these objections can prevail. If the defendant in the original action, instead of obtaining a writ of error had proceeded by way of motion to reverse the outlawry, then it is conceded, that according to the cases of *Plunkett v. Buchanan* (a); *Volet v. Waters* (b), and *Houlditch v. Swinfen* (c), if he does not appear personally, the attorney making the affidavit in support of the motion must shew in express terms that he is duly authorized by the outlaw to make the application. But here the proceeding is by writ of error, and the affidavit is only necessary to shew the existence of the error, in fact, upon which the Attorney General's fiat is founded, and which may be made by any person whatever who can depose to it. In a motion to reverse an outlawry the proceedings are different, and the reason of the rule sought to be extended to the present case is plain. Formerly, the outlaw must have appeared in person; but by the 4 & 5 Wm. and M. c. 18, s. 3, it was enacted, "that no person" "shall be compelled to come in person" "to reverse such outlawry, but shall or may appear by attorney;" and the Court, when asked to reverse an outlawry by *motion*, impose the condition that the attorney appearing shall swear that he is authorized; but on writ of error, which is a writ *ex debito justiciæ*, no such condition can be imposed. To reverse an outlawry on motion, therefore, otherwise than by appearing in person, the party

✓(a) 3 B. & C. 736; S. C. 3 D. & R. 55.

& R. 625.

✓(c) 5 Dowl. 36; S. C. 2 Bing.

✓(b) 2 B. & C. 353; S. C. 3 D. N. C. 712; 3 Scott, 169.

seeking to do so must shew himself to be the authorized "attorney" of the outlaw. Besides, there is nothing here to shew that the writ of error is not sued out by the outlaw himself in person. As to the other objection, it clearly cannot be necessary, or indeed practicable, for the plaintiff to enter an appearance in the original action, until he has succeeded on his writ of error in reversing the outlawry. In truth the non appearance of the outlaw is the very act for which he is outlawed, and it is inconsistent with these proceedings that he should be compelled to enter an appearance. The present application, moreover, it is submitted, is altogether misconceived. This Court has no authority to quash the writ of error, on the ground that it ought not to have issued. The proper Court, to which such an application should be made, is the Court of Chancery; *Jones v. De Lisle* (a); *Boreman v. Brown* (b); and *Holmes v. Newlands* (c).

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Petersdorff, in support of the rule. It is submitted, that whether the proceeding is by motion or by writ of error, it is equally necessary that the Court should see that the party taking it is either the outlaw himself, or his attorney, lawfully authorized. The books of practice would seem to say that the same steps are to be taken whether the proceeding is by motion or by writ of error; and it is not disputed, that in the case of a motion to reverse an outlawry, an affidavit of the authority of the party making it is necessary, according to the cases of *Plunkett v. Buchanan*, and *Houlditch v. Swinfen*, which have been referred to. In 2 *Chit. Archb. Pract.*, p. 1148, 8th ed., it is laid down, in speaking of proceeding by writ of error to reverse an outlawry, "an appearance must be entered, or bail must be put in and perfected, in the same cases, and in the same manner, as where the outlawry is reversed upon motion."

(a) 10 Moore, 617; S. C. 3 Bing. 125. ✓ (b) 1 Dowl. 281, N. S.
✓ (c) 2 Dowl. 716, N. S.

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[*Erle*, J.—No authority is cited for this by Mr. *Chitty*. Suppose the error had been that the writ of summons was defective, or that no writ of summons had in fact been sued out, how could it then be said that an appearance must in the first instance be entered.] These cases may form exceptions to the rule, but in general there seems a stronger reason why the defendant should be compelled to enter an appearance when proceeding by writ of error, than when proceeding by motion. For in the former case, the defendant may otherwise reverse the outlawry as matter of right and without terms, and never enter an appearance in the original action; whereas in the latter case, the rule reversing the outlawry would only be made absolute upon the terms which the Court would dictate. [*Erle*, J.—I should gather from *Tidd's Practice* (a), that the appearance is not entered by the defendant until after the reversal of the outlawry.] As respects the jurisdiction of this Court, the case of *Holmes v. Newlands* (b) shews that at least this Court has authority to set aside the *allowance* of the writ of error; and the present rule is in the alternative.

ERLE, J.—I am of opinion that there is nothing in the objections that have been raised to the present proceedings in error. No authority has been cited to support them. The rule must, therefore, be discharged; but as they seem to have been founded upon a passage in a work of some authority, without costs.

Rule discharged.

✓ (a) Page 142, 9th ed.

✓ (b) 2 Dowl. 716, N. S.

1848.

ROBESON v. ELLIS.

TO an action of assumpsit, containing two counts, one on a bill of exchange, and the other on an account stated, the defendant pleaded generally non assumpsit. On application upon summons before Mr. Justice Coleridge, that learned Judge directed the plea to be set aside with costs, as being in direct contravention of Reg. Gen., Hil. Term, 4 Wm. 4, pt. II. tit. "*Pleading in Particular Actions. Assumpsit*," r. 2.

To an action of assumpsit containing one count on a bill of exchange, and another on an account stated, the defendant pleaded generally non assumpsit:

Held, that the plaintiff was not bound to demur, but might apply to a Judge to set the plea aside.

4. Exch. R. 44.

Lush moved for a rule to rescind the order of the learned Judge. The plaintiff ought to have been left to his ordinary remedy of demurrer. In *Eddison v. Peagram* (a), where a similar plea was pleaded, and the plaintiff signed judgment as for want of a plea, the Court set aside the judgment, saying, that the proper course for the plaintiff to pursue was to have demurred. [*Wightman, J.*—There the plaintiff had taken upon himself to treat the plea as a nullity, by signing judgment; and all that was decided in that case was, that he was not justified in so doing.]

WIGHTMAN, J., (after communicating with *Coleridge, J.*)
—I find from my Brother *Coleridge*, that before making the order, he consulted with some of the other Judges. The plea was clearly a bad plea, and in violation of the new rules, and could not, by any argument, be supported. I think, therefore, the plaintiff was not bound to demur, but might apply to a Judge to set the plea aside. There will be no rule.

Rule refused.

✓(a) *Ante*, vol. 4, p. 277; S. C. 16 M. & W. 137. See also *Bousfield v. Edge*, *ante*, p. 99. ✓

1848.

Ex parte The CHURCHWARDENS and OVERSEERS of the
Poor of the Parish of MONKLEIGH.

No notice of an application for an order, adjudicating the settlement of a lunatic pauper, under the 8 & 9 Vict. c. 126, s. 58, need be given to the parish, on whom it is made.

On appeal against an order for payment of expenses and maintenance under sect. 62, the settlement of the pauper lunatic may be contested.

12-23. 294.
14 - - 310.

MONTAGU Smith applied for a writ of certiorari to remove an order adjudicating the settlement of a lunatic pauper of the name of John Handford, to be in the parish of Monkleigh, in the county of Devon; made on the 26th of August, 1847, under the hands and seals of two magistrates of the borough of Bideford, in the same county: and also for another writ of certiorari to remove another order, for the payment by the parish of Monkleigh, of the expenses of the maintenance, &c., of the same pauper; made on the 27th of August, 1847, under the hands and seals of two magistrates for the county of Devon.

It appeared from the affidavits on which this motion was founded, and which were made by the parish officers of the parish of Monkleigh, that on the 6th of September, 1847, the parish officers of Monkleigh were served with two orders, of which the following are copies:—

Borough of Bideford, in the county of Devon, to wit.	}	To the Churchwardens and Overseers of the poor of the parish of Bideford, in the county of Devon, and to the Churchwardens and Overseers of the poor of the parish of Monkleigh, in the county of Devon.
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Whereas complaint hath been made by you the churchwardens and overseers of the poor of the parish of Bideford aforesaid, unto us whose hands and seals are hereunto set, two of her Majesty's justices of the peace acting in and for the borough of Bideford aforesaid, within which borough the said parish of Bideford is situate, (whereof one is of the quorum) that John Handford, aged about forty years, lately, to wit, within five years now last past, intruded himself into your parish of Bideford, there to inhabit as a parishioner, contrary to the laws relating to the settlement of the poor,

and that he lately became lunatic, and on or about the eleventh day of June now last past, was sent and conveyed from your said parish of Bideford by an order or direction from a justice of the peace acting in and for the said borough of Bideford, to the Devon County Lunatic Asylum at Exminster, in the said county of Devon, and that he has been from that time, and is now confined as and being a lunatic, in the said asylum, at the expense of your said parish of Bideford, and that he is now actually chargeable to your said parish of Bideford.

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We, therefore, upon due examination and inquiry made into the premises aforesaid, and satisfactory evidence being adduced on the oaths of Grace Handford, William Tardrew, and others, now taken before us the said justices, and also upon due consideration had of the premises, do, in pursuance of the statute in such case made and provided, find and adjudge the same to be true; and we do also adjudge that the last legal settlement of the said John Handford was and is in the parish of Monkleigh, in the county of Devon aforesaid.

Given under our hands and seals, the 26th day of August, in the year of our Lord 1847.

CHARLES CARTER,
HENRY R. GLYNN.

County of Devon, } To the Overseers of the poor of the
to wit. } parish of Monkleigh, in the county of
Devon, and to each and every of you.

Whereas complaint has been made to us the undersigned, two of her Majesty's justices of the peace acting in and for the said county of Devon, by the churchwardens and overseers of the poor of the parish of Bideford, in the said county, that John Handford, a pauper, being in the month of June now last past, and immediately previous thereto, chargeable to the said parish of Bideford, was, in the said month of June, found to be a lunatic, and was sent from the said parish of Bideford by virtue of an

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order of Charles Carter, Esq., one of her Majesty's justices of the peace acting in and for the borough of Bideford in the said county, within which borough the said parish of Bideford is situate, to the Devon County Lunatic Asylum, at or near Exmouth, in the county of Devon aforesaid, at the costs and charges of the said parish of Bideford, or of the said churchwardens and overseers of the poor thereof; and that the said John Handford has been maintained, clothed, and provided for in the said asylum from that time up to the day of the date hereof, and now is maintained, clothed, and provided for therein at the expense, costs, and charges of the said parish of Bideford. And whereas it has been duly proved to our satisfaction on oath and otherwise, that on the 26th day of August instant, it was adjudged, in pursuance and under and by virtue of the statute in such case made and provided, by Charles Carter, Esq., and Henry Richard Glynn, Esq., two of her Majesty's justices of the peace, acting in and for the borough of Bideford aforesaid, that the said John Handford was and is legally settled in a parish different from the parish from which he was sent to the said asylum, that is to say, that he was legally settled in the said parish of Monkleigh. And whereas we, the undersigned justices, have now also made due inquiry into the place of legal settlement of the said John Handford, and have ascertained that such place of legal settlement is in the parish of Monkleigh aforesaid. And whereas it has now been duly proved to us on oath, on behalf of the said complainants, that the expenses incurred by the said parish of Bideford in or about the examination of the said lunatic pauper, and his conveyance to the said asylum, and for the lodging, maintenance, medicine, clothing, and care of the said lunatic in the said asylum, up to the 30th day of June now last past, being within twelve calendar months previous to the day of the date hereof, amount to the sum of 3*l*. 8*s*. 6*d*.; and that the said sum of 3*l*. 8*s*. 6*d*. has been paid by the guardians of the poor of the Bideford Union in the said county, of which union the

said parish of Bideford forms part, for and on behalf or on account of the said parish of Bideford. Now, therefore, we the said undersigned justices of the peace having taken the said several matters into our consideration, and after due examination of the evidence adduced on behalf of the said complainants, as well on oath as otherwise, do hereby, in pursuance and by virtue of the statute in such case made and provided, order and direct you, the said overseers of the poor of the said parish of Monkleigh, on the service hereof, to pay to the overseers of the poor of the parish of Bideford aforesaid, or to some or one of them, the said sum of 3*l.* 8*s.* 6*d.*, being the amount of such expenses as aforesaid, and as paid as aforesaid, on account of or for the said parish of Bideford; and we do also hereby further order and direct you, the said overseers of the poor of the parish of Monkleigh, to pay to the treasurer for the time being of the said asylum, or other officer thereof appointed to receive the same, the reasonable charges of the lodging, maintenance, medicine, clothing, and care of the said lunatic, from the said 30th day of June now last past unto the day of the date hereof; and also to pay, from time to time, to such treasurer or other officer of the said asylum as aforesaid, all the reasonable charges of the future lodging, maintenance, clothing, and care of the said lunatic in the said asylum.

Given under our hands and seals at Bideford, in the county of Devon, this 27th day of August, 1847.

CHARLES CARTER,
W. TARDREW.

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That they were not warned or summoned, and had no notice that the said orders were about to be made, and that the same were made *ex parte* and without any opportunity being given to them of answering the same. That they have good reason to believe that the last legal place of settlement of the said John Handford is not in the said parish of Monkleigh; but that by reason of his insanity,

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the last legal place of his settlement is difficult to be ascertained.

Montagu Smith. It is submitted that the Court will grant a certiorari to remove these orders, which are made under the 8 & 9 Vict. c. 126, ss. 58 and 62 (a). There is

(a) Sect. 58 enacts, "that it shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house is situate, or to which such asylum shall wholly or in part belong, or from any part of which any pauper lunatic shall have been sent, at any time to inquire into the last legal settlement of any pauper lunatic confined or ordered to be confined therein; and if satisfactory evidence can be obtained as to such settlement in any parish, township, or place, such justices shall, by order under their hands and seals, adjudge such settlement accordingly."

Sect. 62 enacts, "that if, after any lunatic shall have been sent to an asylum, registered hospital, or licensed house, it shall be adjudged that such lunatic is settled in a parish different from the parish from which, or at the instance of some clergyman or officer of which, he was sent to such asylum, hospital, or house, then and in such case it shall be lawful for any two justices of the county from any part of which any lunatic shall have been sent, or for any two justices, members of the committee of visitors of such asylum, to make an order or orders upon the treasurer of

the guardians of the union including any parish, or of any parish or the overseers of the parish in which such lunatic shall be so adjudged to be settled, for payment to the treasurer of the guardians or overseers of the first mentioned union or parish of all expenses incurred by or on behalf of such union or parish, in or about the examination of such lunatic, and his conveyance to the asylum, hospital, or house, and of all moneys paid by the treasurer of the guardians, or the overseers of such first mentioned union or parish, to the treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and also for payment to the treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house, of the reasonable charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic; and every treasurer of the guardians or overseer on whom any such last mentioned order shall be made shall, out of any money which may come into his hands by virtue of his office, immediately pay to the treasurer of the guar-

no appeal given against an order made under sect. 58; the general appeal clause, sect. 80, expressly excepting from its operation orders adjudicating the settlement, or the payment of the expenses and maintenance, of lunatic paupers. The first order is therefore bad, as being an *ex parte* proceeding, and no notice having been given to the parish officers of Monkleigh, who were to be affected by it. The second order, adjudicating the payment of the expenses and maintenance of the pauper under the 62nd section, is also bad, if the first is bad; as the first order must be made in order to give the justices jurisdiction to make the second. It is submitted, that in all cases where a power is conferred upon justices to make an order which is to affect the interests of third parties, those parties ought to have notice of it, and be afforded an opportunity of contesting it. The case of *The Queen v. Totness Union* (a) is an authority of this Court to that effect, following the general principle laid down in *Painter v. Liverpool Gas Company* (b). [Erle, J.—Your principle would extend to all cases under the Poor Law Acts. There the order of removal is always made *ex parte*, and the first notice the parties have of the proceeding is the copy of the order being served upon them.] In cases

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dians or overseers of such first mentioned union or parish the amount of the expenses and monies by such order directed to be paid to him or them, and from time to time pay to the said treasurer, officer, or proprietor of the asylum, registered hospital, or licensed house the future charges aforesaid: Provided always, that the guardians of any union or parish, or the overseers of any parish, township, or place, affected by such order, may appeal against the same in like manner as if the same were a warrant of removal; and in case of such appeal the guardians of

the union or parish, or the overseers of the parish, township, or place, or the clerk of the peace of the county to which such lunatic was chargeable before such order was made, may defend such appeal, and the persons appealing or intending to appeal, and the persons defending such appeal, shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects as in the case of an appeal against a warrant of removal."

✓(a) 7 Q. B. 690.

(b) 3 A. & E. 433; S. C. 6 N. & M. 736.

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of removal under the Poor Law Act, the pauper himself must be summoned; he is considered a party interested against the removal (a); but in the case of a lunatic pauper, such a proceeding could have no effect. Besides, under the Poor Law Act, there is a power of appeal against an order of removal. Here no such power is given. [*Erle, J.*—There is a power of appeal given against an order for maintenance under the 62nd section. Has not the validity of the adjudication of settlement been questioned in an appeal against the order of maintenance?] There is a case of *Reg. v. Justices of Middlesex* (b), where Mr. Justice *Wightman* seems to have been of opinion, that an appeal against an order of maintenance included an appeal against the adjudication of the settlement; but it was not necessary in that case to decide the point. [*Erle, J.*—If your contention is correct that the party must be summoned, then if he does appear, the order would be conclusive. It would be much more consonant to general principles, that an order adjudicating the settlement of a lunatic pauper should be open to dispute in the same manner as orders respecting the settlement of other paupers are.] The order for payment of expenses, &c., may be enforced by distress (c), and it would be most inconvenient to send parties to the sessions to dispute items of a trifling amount.

Cur. adv. vult.

ERLE, J.—In this case a certiorari was moved for, to remove an order adjudicating the settlement of a pauper confined in a lunatic asylum, to be in the parish of Monkleigh; and a second certiorari to remove a second order for payment of expenses and maintenance; on the ground that no notice was given to the parish to be charged, of the inquiry into the settlement.

(a) See *R. v. Wykes*, 2 Andr. 238; S. C. 2 Bott. 819.

(b) Since reported, *ante*, p. 9.

(c) Sect. 68.

But it appears to me, that the principle requiring notice to be given to the party of every proceeding by which he may be charged, does not apply to orders of removal; and that an order adjudicating the settlement of a confined lunatic is, in this respect, to be classed, with orders of removal.

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Under the 8 & 9 Vict. c. 126, s. 62, parishes affected by an order of payment of maintenance may appeal against the same as if it were a warrant of removal, and all the rights and obligations incident to an appeal against an order of removal, attach to an appeal against such an order for payment of maintenance. The appeal, therefore, appears to be contemplated as the time for trial in this case, as well as in cases of orders of removal.

See 12, 26, 1871.

This view is confirmed by the provision in sect. 59 for notice to the clerk of the peace of the county, where the settlement cannot be discovered, and an order for maintenance on the county is proposed: whereas no such notice is stated to be required in case of an order for maintenance on a parish.

The remedy, therefore, was by appeal, and a certiorari ought not to be granted.

Rule refused (a).

(a) See sect. 60, where an appeal in which the adjudication of settlement may be called in question, is obviously contemplated; for it enacts, "that in every case of an inquiry, inves-

tigation, dispute, or *appeal as to the parish in which a pauper lunatic is settled*," the guardians, &c. of the parish interested may have access to the pauper lunatic.

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JONES v. KING.

Where a party has conducted a cause in person, it is not necessary, in order to enable him to take a step in the cause by attorney, that he should obtain an order for the purpose, or that he should give the other side previous notice of the appointment of the attorney. Taking the step by attorney is in itself a sufficient notice to the opposite party of the appointment.

THIS was a rule for judgment as in case of a nonsuit. The defendant had been served personally with a copy of the writ of summons, and not having appeared within the proper time, the plaintiff had entered an appearance for him according to the statute, and delivered a declaration. The defendant pleaded in person, and issue was joined. The present rule, however, had been obtained upon an affidavit of A. B., gentleman, "attorney for the above named defendant," &c.

Miller shewed cause. The defendant has conducted the cause hitherto in person, and if he now wishes to do so by attorney, he should have given the plaintiff notice that he had appointed an attorney. It is submitted, that not having done so, the plaintiff is not bound to take any notice of the present rule. In 1 *Chit. Archb.* p. 55 (a), it is said, that unless an order for changing the attorney in the progress of the suit is obtained and served on the opposite party, he is "not bound to take notice of any proceeding in the name of another attorney, unless such proceeding be sanctioned by a Judge or the Court." The same rule, it is submitted, would apply where the defendant appears in person, and afterwards appoints an attorney.

ERLE, J.—If a party has appeared by attorney, and afterwards changes his attorney, he must give the opposite party notice of the change, in order that they may know upon whom to serve notices and other proceedings in the cause. But where a party has appeared in person, and afterwards takes a step by attorney, the taking that step seems to me a sufficient notice to the opposite party of the appointment of the attorney. I am informed by the Master

that in practice it is so considered, and that no other notice is ordinarily given. I think that the practice is reasonable, and as no authority has been cited against it, the objection must fail.

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Miller then shewed cause on the merits.

Prentice, in support of the rule.

Rule discharged, on peremptory undertaking.

Ex parte COOKE.

WHITEHURST moved for a rule for a mandamus to J. G. Fisher, steward of the manor of Sherringham, in the county of Norfolk, to allow one J. Cooke to inspect the Court rolls of the said manor, and to take abstracts of the same; and also to admit him, the said J. Cooke, as a copyholder to a certain mansion, messuages, lands and premises within the said manor.

The affidavits upon which the application was made, did not state positively that the applicant was entitled to the lands in question; but only that he, the applicant, "verily believes that he is legally or equitably entitled to a certain mansion, messuages, lands and hereditaments, situate at Sherringham, in the county of Norfolk, and copyhold of the said manor or manors of Sherringham aforesaid." There was no statement of title, or of any grounds upon which the belief was founded. The affidavits shewed a demand and refusal on the part of the steward and lord of the manor.

On application for a mandamus to inspect the Court rolls of a manor, to a copyhold in which the applicant claims to be entitled, the affidavit in support of the rule should either state positively that the applicant is the party entitled thereto, or should set out the title on which he rests his claim, so that the Court may judge of its reasonableness.

Whitehurst. The case of *Rex v. Tower* (a) shews that

✓ (a) 4 M. & S. 162.

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this is the proper mode of proceeding, where a copyholder is refused access to the Court rolls. It would be a great hardship upon a party claiming to be entitled to copyhold lands, if he were not to be allowed to inspect the Court rolls.

ERLE, J.—The applicant should at least swear positively that he is entitled to the copyhold land in question, or set out in his affidavit the title on which he grounds his claim, so that the Court might see that there is a reasonable foundation for it. Here, however, he neither does one nor the other; but merely swears that he “believes that he is legally or equitably entitled” to the property. That is not sufficient, and the rule must, therefore, be refused.

Rule refused (a).

✓ (a) See *Rees v. Lucas*, 10 East, 235.

PYE v. MUMFORD.

(In the full Court.)

sc. 11-20.666

Where to trespass quare clausum fregit, the defendant pleads thirty years' enjoyment of a right on the land in which, &c., under the 2 & 3 Wm. 4, c. 71, s. 1, the plaintiff, if he relies on the fact that

THIS was an action of trespass, quare clausum fregit, and for laying dung, &c., upon the plaintiff's land; to which the defendant had pleaded, fifthly, that he was seized in his demesne as of fee of and in an adjoining farm, and that he and those whose estate he has, for thirty years next before the commencement of the suit, have continually had and enjoyed as of right, &c., the right and privilege to lay the dung, &c., upon the locus in quo, until it has been formed during part of those thirty years the land has been held by a tenant for life, or on any other matter of fact not inconsistent with the simple fact of enjoyment, should reply it specially, and not traverse the enjoyment as pleaded.

into manure, and has become in a fit state to be carried. The plaintiff by his replication traversed the enjoyment, upon which issue was joined. The cause came on for trial at the Suffolk Spring Assizes, 1847, when the defendant having proved the enjoyment for thirty years next before the action, the plaintiff proved, that during part of those thirty years, the land had been held by a tenant for life. A verdict was entered for the plaintiff on all the issues, with nominal damages, leave being reserved to the defendant to move to enter a verdict on the issue on the fifth plea. A rule nisi having accordingly been obtained,

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Byles, Serjt., and *O'Malley*, now shewed cause.

Andrews and *Worlledge*, in support of the rule.

The stat. 2 & 3 Wm. 4, c. 71, and the following authorities, were referred to in the course of the argument; *Tickle v. Brown* (a); *Beasley v. Clarke* (b); *Bright v. Walker* (c); *Onley v. Gardiner* (d); *Kinloch v. Nevile* (e); *Thibault v. Gibson* (f); *Clayton v. Corby* (g); *Wright v. Williams* (h); and *Bengough v. Edridge* (i).

Cur. adv. vult.

Afterwards (k),

COLERIDGE, J., delivered the judgment of the Court.—This was an action of trespass quare clausum fregit. The defendant pleaded the enjoyment of a right on the land for

✓(a) 4 A. & E. 369; S. C. 6 N. & M. 230.

(b) 2 Bing. N. C. 705; S. C. 3 Scott, 258; 5 Dowl. 50.

(c) 1 Cr., M. & R. 211.

(d) 4 M. & W. 496.

✓(e) 6 M. & W. 795.

✓(f) 12 M. & W. 88; S. C. *ante*, vol. 1, p. 253.

✓(g) 2 Q. B. 813; S. C. 2 G. & D. 174.

(h) 1 M. & W. 77.

(i) 1 Sim. 173.

(k) In Hilary Vacation, 1848.

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thirty years, under the first section of 2 & 3 Wm. 4, c. 71. The plaintiff, by his replication, traversed the enjoyment. On the trial the defendant proved the enjoyment for thirty years next before the action; in answer to which the plaintiff proved, that during part of those thirty years the land had been held by a tenant for life. The question is, whether the plaintiff was at liberty to do so, or whether he ought to have replied that fact specially. By section 7 it is plain, that the time, during which the tenancy for life subsisted, is to be left out in computing the thirty years; and the defendant, if the point be properly raised by the pleadings, must shew an enjoyment for thirty years exclusive of that time, either subsequent to that time, or partly prior and partly subsequent. This was established in *Clayton v. Corby* (a). Whether the point was properly raised depends on the fifth section, which enacts, "that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement, in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." Now the tenancy for life is clearly "a matter of fact, not inconsistent with the simple

✓ (a) 2 Q. B. 813.

fact of enjoyment;" and, therefore, if it be an answer to the defendant's plea, it is plain that, by the express words of the fifth section, it ought to be replied, and cannot be received in evidence on the traverse taken. Whether it be an answer to the plea depends upon the sense in which that plea is to be read. If the plea asserts thirty years' enjoyment computed as the seventh section directs, that is, exclusive of tenancies for life, &c.; then the statement of a tenancy for life would obviously be no answer to the plea, for the plea has already excluded the time of such tenancy. The plaintiff, in such case, could not rely on the tenancy for life; and, therefore, need not, and could not, reply it. If, on the other hand, the plea is to be read as *primâ facie*, asserting an enjoyment for the actual thirty years next before the action, counted in the ordinary manner; then the tenancy for life during a part of that time would be *primâ facie* an answer to the plea, and would be relied on by the plaintiff, and ought to be replied. The defendant would then be driven to rejoin, either denying the tenancy for life, or in some form asserting an enjoyment for thirty years, exclusive of the time of that tenancy. It is said that such a rejoinder as last mentioned would be a departure from the plea, because to make it consistent with the plea, the sense first supposed must be given to the plea, and then the replication would be unnecessary; whereas the sense secondly supposed is the only one which calls for a replication. The Court, in *Clayton v. Corby* (a) said, that "the thirty years alleged in the plea will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication." We think this to be the true construction of the plea. The defendant cannot be supposed to know the plaintiff's title, or to be cognizant of any tenancy for life; he may well intend to set up thirty years' enjoyment actually next before the action; but when he is informed by the plaintiff's repli-

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(a) 2 Q. B. 825.

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cation that a tenancy for life existed, he may well prepare to establish an enjoyment for thirty years constructively. The words of the plea are large enough for either case, and the second sense put on them by the rejoinder is in the nature of a new assignment. It is true that a new assignment proceeds on the supposition that the other party has mistaken the meaning of the previous pleading; and, doubtless, any new assignment, which enlarges and goes beyond the previous pleading of the same party, is bad. The rejoinder, therefore, in such a case as the present, cannot be taken as being strictly a new assignment: it would be a departure, and contrary to the rules of pleading. But it would be necessary, and therefore good by force of the statute, if we are right in saying that the statute requires that a tenancy for life should be specially replied. No other view of the pleadings would put the parties on equal terms, nor meet the plain intention of the Legislature, collected from the words of the fifth and seventh sections of the act.

Some argument was raised in respect of the word "hereinbefore" used in the fifth section; but it is not necessary to consider this, for that word is not applicable to the subsequent words, "matter of fact not inconsistent with the simple fact of enjoyment," on which our judgment turns.

We are, therefore, of opinion that the evidence was improperly received, and that the rule ought to be absolute to enter a verdict for the defendant on the fifth plea; but, under the circumstances, we think that the plaintiff ought to be at liberty to amend on payment of costs, and that a new trial ought to be granted.

Rule accordingly.

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HOLT and Another, Assignees, &c. v. KERSHAW.

HUGH Hill moved on behalf of the assignees of the defendant, for a rule calling upon the plaintiffs to shew cause why the judgment signed upon a warrant of attorney in this case, and all subsequent proceeding thereon, should not be set aside for irregularity, on the ground that there was no sufficient attestation of the warrant under the statute.

The warrant of attorney was dated the 3rd of July, 1847, and the attestation was in the following form:—"Signed, sealed, and delivered, being first duly stamped, by the said James Kershaw, in the presence of William Keating Taylor, one of the attorneys of her Majesty's Court of Queen's Bench at Westminster, and attorney on behalf of the said James Kershaw, expressly named by him, and attending at his request, to inform him, and I did inform him, of the nature and effect of the above written warrant of attorney before the same was executed by him, and I declare myself to be the attorney for the same James Kershaw, W. Keating Taylor."

It is submitted that this attestation is insufficient. The statute 1 & 2 Vict. c. 110, s. 9, says, that the attorney "shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." Here there is no statement that he subscribes as such attorney. [*Erle, J.*—He declares himself to be the attorney for the person executing the warrant, and eo-instanti, he signs the attestation.] It is submitted that the language of the statute is plain, and should be strictly followed; and that an equivalent for the attestation required by the statute should not be allowed. In *Everard v. Poppleton (a)*, a warrant of attorney was attested as

A warrant of attorney was attested in the following form:—"Signed," &c., "by the said J. K., in the presence of W. K. T., one of the attorneys of her Majesty's Court of Queen's Bench at Westminster, and attorney on behalf of the said J. K., expressly named by him, and attending at his request to inform him, and I did inform him, of the nature and effect of the above written warrant of attorney before the same was executed by him, and I declare myself to be the attorney for the same J. K., W. K. T." Held sufficient.

✓ (a) 5 Q. B. 181; S. C. 1 D. & M. 322.

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follows:—"Signed," "by the above named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said G. C. P. before the execution thereof by him." Signed "J. H. S., attorney, Leeds. J. R.," and the attestation was held insufficient for want of a statement that J. H. S. subscribed as attorney for G. C. P. Lord *Denman*, in delivering judgment, there says (a), "I should like to see the words of the statute always literally followed; nothing is more unfortunate than a disturbance of the plain language of the Legislature by the attempt to use equivalent terms." [*Erle*, J.—The statute requires that in the subscription the attorney "shall declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." In the case cited, the objection was, that he did not expressly declare himself to be the attorney. Here he says, "I declare myself to be the attorney for the same James Kershaw;" and immediately after comes his signature. Does he not, therefore, at the moment he subscribes the warrant, state that he does so as such attorney? I have considered this question very fully on different occasions; and I have satisfied myself that the meaning of the Legislature is, that the attorney, at the moment of signing the attestation, should declare himself to be the attorney of the party in the transaction, and that he signs it as such; and the question in each particular case is, does this sufficiently appear to have been done.]

Lowndes, amicus curiæ, referred to *Lewis v. Lord Kensington* (b).

ERLE, J.—I have had occasion very recently to look at that case, and I fully concur in the decision there come to.

✓ (a) 5 Q. B. 184.

✓ (b) *Ante*, vol. 3, p. 637; S. C. 2 C. B. 463.

The attestation in that case was, "signed," &c., "in the presence of H. Whitaker, attorney for the said Lord Kensington, expressly named by him, and attending at his request;" and the Court of Common Pleas held that that was a sufficient allegation that he was the attorney of Lord Kensington in the business. So here it is "signed," &c., "in the presence of W. K. Taylor, one of the attorneys of," &c., "and attorney on behalf of the said James Kershaw, expressly named by him, and attending at his request," &c.; and I think that is a sufficient declaration that he was the attorney employed by Kershaw in the transaction. In the case cited, the attestation continued: "I hereby subscribe myself to be the attorney for him," which was held to be equivalent to the allegation that he subscribed "as such attorney." Here the words are, "and I declare myself to be the attorney for the same James Kershaw, W. K. Taylor;" which I think are to the same effect. I am, therefore, of opinion that this attestation substantially complies with the requisitions of the statute, and that no rule ought to be granted (*a*).

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Rule refused (*b*).

✓ (*a*) See *Phillips v. Gibbs*, *ante*, vol. 4, p. 275.

(*b*) *Hugh Hill* then objected that execution had issued for a larger sum than was warranted by the defeazance, and upon this

point obtained a rule nisi to restrict the levy to the sum due, and to pay over the surplus to the assignees.

See the following case.

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GAY v. HALL (a).

The attestation to a warrant of attorney was as follows: "Signed, sealed, and delivered by the said H. H., in my presence, and I declare myself to be the attorney for the said H. H., and that I subscribe as such attorney, G. O., solicitor." *Held* sufficient.

Where goods were vested in trustees for the benefit of infants, but the trustees declined to act, and the grandmother of the infants with whom they were living, took away part of the goods, but permitted the rest to remain in the possession of the stepfather, on his giving a warrant of attorney; the Court refused to set aside the warrant of attorney, on the ground of want of consideration.

Semble, that the Court will not set aside a warrant of attorney upon motion, even if a total want of consideration appears.

A RULE had been obtained in Trinity Term last, calling upon the plaintiff to shew cause why the warrant of attorney herein, the judgment signed thereon, and all subsequent proceedings should not be set aside.

It appeared upon the affidavits that the defendant had married the plaintiff's daughter. That she had had children by a former husband, and that certain goods and furniture had been vested in trustees for the benefit of those children, but that the trustees had refused to act. That the plaintiff's daughter, shortly after her marriage with the defendant, died. That the goods and furniture being in the possession of the defendant at the time of her death, the plaintiff, with whom the children were living, and by whom they were being brought up, took away part of the goods, but permitted the rest to remain in the possession of the defendant on his giving a warrant of attorney. That accordingly, in the month of March, in the present year, the defendant gave the plaintiff a warrant of attorney, the attestation to which was in the following form:—"Signed, sealed, and delivered by the said Henry Hall in my presence, and I declare myself to be the attorney for the said Henry Hall, and that I subscribe as such attorney, GEO. OVERTON, solicitor, Merthyr." It appeared that the warrant of attorney was under seal, and was dated on the 18th of March, 1848, and that the defendant's goods had been seized under an execution upon a judgment thereon in May in the present year.

Willes now shewed cause. The first objection that is

(a) This case was decided in Michaelmas Term, 1848, but may be here conveniently inserted. See the foregoing case.

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made against this warrant of attorney is, that it is not stated in the attestation that the attorney signing it was expressly named by the defendant and attending at his request to inform him of the nature thereof; and it is submitted that it is not necessary that it should do so. The stat. 1 & 2 Vict. c. 110, s. 9, enacts, "that no warrant of attorney," &c., "given by any person, shall be of any force unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant of attorney," &c., "before the same is executed." That is what is to be done, then comes what is to be stated in the warrant of attorney; "which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." It cannot be necessary to go further than the statute. A warrant of attorney is an instrument recognised by the common law of the land and would be valid without any attestation whatever, but for the act of Parliament. It cannot, therefore, be necessary that he should state in the attestation more than is required by the act of Parliament. Another objection is, that there was no consideration for the warrant of attorney. [He submitted that, on the facts as they appeared in the affidavits, a sufficient consideration existed.] But even if the Court were of opinion that there was no consideration, they would not set aside the warrant of attorney on that ground. No case has gone so far as to decide that the want of consideration is a ground for setting aside a warrant of attorney. The cases on this subject will be found collected in 2 *Chit. Arch.* 860, 8th ed. The present warrant of attorney is under seal, and the general rule is that no consideration is necessary to support an instrument under seal. If the present application were granted, in every action in which a warrant of attorney is given, the

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defendant might afterwards put the plaintiff upon proving his cause of action (a).

Greaves, in support of the rule. The intention of the act in requiring an attestation was that the Court should be enabled to see on the face of the document that the requisitions of the statute have been complied with. Of the numerous cases decided on this subject, not one can be found in which an omission like the present has occurred. In *Elkington v. Holland* (b), *Hibbert v. Burton* (c), and *Everard v. Poppleton* (d), which were all cases of insufficient attestations, the words "expressly named by him," were yet to be found. [He referred also to *Holt and Another v. Kershaw* (e)]. As to the other point, it is submitted that there must be a good consideration for a warrant of attorney, and that if none exists the Court will set it aside on motion. The warrant of attorney is in many cases substituted for the action itself. An action cannot be supported without a consideration for the defendant's promise, how then can the warrant of attorney? There is no express authority on the subject. He referred to 2 *Chit. Arch. Pract.* 860, 8th ed.

Cur. adv. vult.

PATTERSON, J., afterwards delivered judgment (f).

This was a rule to set aside a warrant of attorney, the judgment signed thereon, and all subsequent proceedings.

(a) There was also a third point argued, namely, whether the defendant had in fact expressly named the attesting attorney within the meaning of the act of Parliament; but as this point turned principally upon the contradictory statements in the affidavits, the argument on both sides, as well as the judgment,

is omitted.

(b) 19 M. & W. 659; S. C. 1 Dowl. 643, N. S. ✓

✓(c) 10 M. & W. 678; S. C. 2 Dowl. 434, N. S.

✓(d) 5 Q. B. 181; S. C. 1 D. & M. 322. See *Lewis v. Lord Kensington*, ante, vol. 3, p. 637.

✓(e) Since reported, ante, p. 419.

(f) In Michaelmas Term, 1848.

There were two objections raised to the warrant of attorney; first, that the form of the attestation was insufficient; and secondly, that there was no consideration for its being given.

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The attestation is confined to the words of the statute. It says, "Signed, sealed, and delivered in my presence, and I declare myself to be the attorney for the said Henry Hall, and that I subscribe as such attorney, GEO. OVERTON, solicitor;" but it does not say anything about his being expressly named by the defendant or attending at his request, and it was contended that it should have done so. On the argument no case was cited, nor have I been able to find any, in which it has been held necessary that any such statement should be inserted in the attestation, although in some of the cases the Court seems to have approved of their insertion.

On looking at the words of the act, they only require that the "attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney;" and I think that I am bound by these words, and ought not to exact that more should be stated than the act itself requires. I am, therefore of opinion that the attestation in this case is sufficient.

Then comes the second question, namely, whether there was any consideration for this warrant of attorney, and if not, whether that is a ground for setting it aside. I cannot find any case, nor was any cited in the argument, to shew, that a want of consideration will vitiate a warrant of attorney. There are, undoubtedly, cases in which warrants of attorney have been set aside for defective consideration, such as fraud, illegality, &c.; but none in which mere want of consideration has been held sufficient. There is one case where a man having executed a warrant of attorney to a friend to whom he was not indebted, a question

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arose whether that was not void ; but it was not a question whether he himself might avoid it, but whether his creditors could. Therefore, if this were a case where there was a total want of consideration, I should have had some difficulty in setting it aside on that ground; but it is not necessary to decide that point, for under the particular circumstances of this case, I am of opinion, that although there was no consideration on which the plaintiff could have sued the defendant, still there was sufficient colour, for giving the warrant of attorney, to prevent me from interfering to set it aside.

The rule must, therefore, be discharged, and with costs.

Rule discharged, with costs.

REGINA v. JUSTICES of CHESHIRE.

(KERMINCHAM v. LOWER WITHINGTON.)

Where a party unsuccessfully opposes a rule for a mandamus to set right the sessions, who have wrongly decided a matter in his favour, he will in general be made to pay the costs of the mandamus; unless, perhaps, the matter is wrongly decided by the Court itself, uninfluenced by any improper objection on his part.

A RULE had been obtained in Michaelmas Term last, calling upon the overseers of the township of Lower Withington, in the county of Chester, to shew cause why they should not pay to the appellants the costs of and consequent upon their application to this Court for a writ of mandamus, and of the return made thereto, and the costs of this application for them.

The facts, as they appeared upon the affidavits, were shortly these: An appeal against an order of removal, in which the overseers of Kermincham were appellants and the overseers of Lower Withington were respondents, came on for trial at the Epiphany Quarter Sessions, 1847, for the county of Chester, holden by adjournment at Knuts-

On an application for a rule for the payment of such costs, it is not necessary that a demand of the costs from the opposite party should have been previously made.

ford. It appeared that the quarter sessions begin at Chester, and are held afterwards, by adjournment, at Knutsford, for the northern division of the county. The respondents objected to the notice of appeal that it was given for the sessions to be holden at Chester, and contended that it ought to have stated that it was given for the adjourned sessions at Knutsford. The sessions entertained the objection, and refused to hear the appeal. In Hilary Term, 1847, the appellants obtained a rule nisi for a mandamus to compel the sessions to enter continuances and hear the appeal: against which the respondents shewed cause in Trinity Term in the same year; when the Court, in the absence of any evidence to shew that the practice of the sessions required the notice in a different form to the one used, made the rule absolute (*a*). The appeal had since been tried, and the order of removal was quashed. The present rule was then obtained. It did not appear upon the affidavits in support of the rule, whether any demand of the costs of the mandamus had been made upon the respondents.

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Pashley now shewed cause. Although the general rule may be that the costs of a mandamus follow the event, the Court will not visit a party with costs who merely comes here to support a judgment of the Court below in his favour. Where the judgment of the Court below has been pronounced in favour of a party, he ought not to be bound to decide upon the validity of it, at the peril of being visited with costs in case of failure. The case might be different supposing the unsuccessful party were trying to reverse the decision of the Court below. In *Regina v. The Sheriff of Middlesex* (*b*), on execution of an inquiry under a Railway Act, the sheriff stopped the case on a preliminary objection. A rule was obtained, calling on the sheriff to shew cause

✓(*a*) See *Reg. v. Justices of Suffolk*, *ante*, vol. 4, p. 628.

✓(*b*) 5 Q. B. 365.

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why a mandamus should not issue directing him to proceed with the inquiry. Counsel instructed by the Railway Company, who had succeeded before the sheriff, opposed the rule; but a mandamus issued and was obeyed. On motion for the costs of the mandamus to be paid by the company, it was objected, that not being immediate parties to the rule, the company were not liable to costs; and the Court held, that at all events, they could not be subjected to costs for supporting a judicial decision in their favour. To the same effect is the case of *Regina v. Justices of West Riding of Yorkshire* (a). In *Regina v. The Justices of London* (b), where the costs of the mandamus were allowed against the successful party in the Court below, the case of *Regina v. Sheriff of Middlesex* does not appear to have been referred to. Mr. Justice Wightman there said, in delivering judgment,—“ I have had some difficulty in coming to the conclusion that this rule ought to be made absolute, inasmuch as the error committed arose from a mistake of the sessions. I do not, however, wish to lay down any general rule on the subject, for the Court, in the exercise of its discretion, must be guided by the particular circumstances of each case.” In that case, the objection in the Court below was clearly frivolous; and, therefore, the party who had misled the Court below into a wrong decision, which rendered a mandamus necessary, and who opposed the mandamus being issued, was rightly visited with the costs of the mandamus. In the present instance the objection is not clearly frivolous, and the Court only decided on issuing the mandamus after argument and after hearing the counsel in support of the rule. There is another answer to this application. The affidavits should have shewn that the costs of the mandamus were demanded before putting the parties to the expense of this application.

(a) 5 Q. B. 1. S. C. 3 D. & G.
170.

(b) Since reported, 9 Q. B. 41.

Pashley cited the case from 2 Car.,
Ham. & Allen's New Cases, 568.

Townsend, in support of the rule. The objection to the notice of appeal was clearly untenable, as *Regina v. Justices of Suffolk* shews (a); and there was no pretence for saying that the respondents were deceived by the notice, as they appeared to take the objection at the Knutsford sessions. The respondents ought not, therefore, to have shewn cause against the rule for the mandamus, and in that case, probably, they would not have been subject to costs. Their doing so was vexatious, and the Court will consider this as a proper case for inflicting costs. In *Regina v. The Justices of Surrey* (b), it was decided that where a party obtains a judgment of the sessions in his favour on a frivolous objection, and afterwards opposes a mandamus issuing to set it right, the Court will make him pay the costs of the mandamus. As to a demand of the costs being made before this motion was made, there is no rule or practice that requires it. In point of fact it could not be done, as the costs cannot be taxed until this Court order them to be paid.

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WIGHTMAN, J.—I think that this case comes within the rule, that, in general, the costs must follow the event of the mandamus. The respondents were not misled by the notice of appeal to which they objected, for they came to the Knutsford Sessions to take the objection. I see nothing in this case, therefore, to take it out of the ordinary rule; and unless there were, according to the cases which have been cited, the costs must follow the event. I think it is right they should do so in all cases, unless there be special circumstances which would render the application of the rule unjust; such, perhaps, as where the matter is wrongly decided by the Court itself, uninfluenced by any improper objection by the party in whose favour it is decided.

✓ (a) *Ante*, vol. 4, p. 628.

✓ (b) Since reported, 9 Q. B. 37.

Townsend cited the case, *nom.*

Reg. v. The Overseers of Oxsted,
from 2 Car., Ham. & Allen's
New Sess. Cases, 357.

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Here, however, the objection which has rendered these proceedings necessary, was taken by the respondents themselves, and they afterwards persevere in opposing a mandamus to set the matter right.

With respect to the other point, I am informed, by the officer of the Crown Office, that it is not necessary that there should be a previous demand of the costs; that in practice none is ever made; and that there is no rule requiring an affidavit stating such a demand.

Rule absolute (a).

(a) See the next case.

REGINA v. The JUSTICES of CUMBERLAND.

REGINA v. The JUSTICES of LANCASHIRE (a).

A party, who succeeds at the sessions upon an objection which turns out to be ill founded, and resists an application for a mandamus to correct the error, by shewing cause against it, is within the general rule for the payment of the costs by the unsuccessful party; subject to exceptions which the Court may make in particular cases in the exercise of their general jurisdiction over the costs.

IN the first mentioned case, a rule had been obtained in Easter Term last, calling on the churchwardens and overseers of the poor of the township of Ellenborough and Ewanrigg, in the county of Cumberland, to shew cause why they should not pay to the Whitehaven Junction Railway Company, the prosecutors in this prosecution, or to their attorney, the costs of and occasioned by the application for the said writ and consequent thereon, the costs of the said writ and of the return thereto, and the costs of this application.

(a) These cases were decided in Trinity Term, 1848, but are here inserted on account of their reference to the foregoing case. They are reported together, as they involve the same point, were argued the same day, and were included in the same judgment.

It appeared upon the affidavits, in support of the rule, that an appeal by the Whitehaven Junction Railway Company against a poor rate made by the township of Ellenborough and Ewanrigg upon the railway within the township, came on for trial at the Michaelmas Quarter Sessions, 1847, when the counsel for the respondents objected that the appeal could not be heard, because the notice of appeal was not properly signed; the attornies signing it, on behalf of the company, not having been appointed under the seal of the company. It did not appear that sections 83 and 90 of the company's act, 7 & 8 Vict. c. lxiv., by which the directors were empowered amongst other powers to be exercised by them "to appoint or displace any of the officers of the company," were brought specifically under the notice of the quarter sessions, who, treating the company as an ordinary body corporate, considered the objection as a fatal one, and refused to hear the appeal.

In Michaelmas Term, 1847, the appellants came to this Court for a mandamus to compel them to enter and hear the appeal. The rule nisi for a mandamus called on the justices to shew cause, but was directed to be served also on the churchwardens and overseers of the respondent township. The justices did not shew cause, but the churchwardens and overseers did; and attention being drawn to the terms of the act, this Court, in Hilary Term, 1848, made the rule absolute (a). At the Easter

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(a) REGINA v. The JUSTICES of CUMBERLAND.

THIS was a rule for a mandamus to the Justices of Cumberland to enter continuances and hear an appeal against an assessment of a poor rate, in which the Whitehaven Junction Railway Company were appellants, and the overseers of the township of Ellenborough respondents.

It appeared that upon the hearing of the appeal, the notice of the officers of the company; the appointment of an attorney to the company need not be under seal.

Where a private act of Parliament, constituting a railway company, provides that the directors may "appoint or displace any

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Quarter Sessions, the justices proceeded accordingly to hear the appeal, and held that the rate should be amended, and the rateable value of the defendants' property should

appeal proved by the appellants was signed "Armistead and Musgrove, attorneys for the above named Whitehaven Junction Railway Company." The respondents objected that the company being a corporation by act of Parliament, the appointment of the attorneys must be proved under the corporate seal of the company, and that not being done, the sessions decided in favour of the objection, and refused to hear the appeal.

Cooling and Ramsday shewed cause (*Hilary Term, 1848*), and referred to the 41 Geo. 3, c. 23, s. 4, requiring the notice of appeal against an assessment to a poor rate to be signed "by the person" "giving the same, or his, her, or their attorney, on his, her, or their behalf," and cited *Com. Dig.* tit. "*Franch.*" (F 13), and *Arnold v. The Corporation of Poole* (4 M. & G. 860; S. C. 5 Scott, N. R. 741; 2 Dowl. 574, N. S.) as authorities, that in the case of a corporation, as the railway company was, it was necessary that the appointment of an attorney should be under the corporation seal. They admitted, however, that by the act of Parliament constituting this company (7 & 8 Vict. c. lxiv.), a parol appointment by the directors under the 83rd section, which enacts, "that the directors shall have the management and superintendence of the affairs of the company," and "may lawfully exercise all the powers of the company," &c., "and amongst other powers to be exercised by the directors," "may appoint and displace any of the officers of the company," &c., might have been sufficient; but they contended that no appointment at all having been proved, the sessions were right in the decision to which they came.

[It not appearing, however, sufficiently on the affidavits that this latter objection was raised at the sessions]

Martin and Greig, in support of the rule, were not called upon.

WIGHTMAN, J.—I feel no difficulty in this case. The sessions seem to have laboured under the mistake that this corporation was in all respects as other corporations, and not under a special act of Parliament. It is clear, that under the 83rd section, the directors may appoint the officers of the company by parol, and if so, that they may appoint an attorney; and, indeed, that point is conceded by the respondents; but it is said that no appointment at all was proved. That objection, however, was not taken at sessions, and therefore, cannot avail now. The rule must be absolute.

Rule absolute.

be reduced from 170*l.* to 50*l.*, and that the respondents should pay the costs of the appeal. The present rule having been accordingly obtained,

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Cowling and *Ramshay* now shewed cause. It is submitted that this is not a case in which the Court will compel the unsuccessful party to pay the costs of the mandamus. The application is to the discretion of the Court under the 1 Wm. 4, c. 21, s. 6, which enacts, "that in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid." The rule laid down in cases, like the present, is that wherever the Court below gives judgment in favour of an objection, the parties coming here to uphold the decision of the Court below in their favour, ought not to be visited with the costs, if this Court should decide the judgment to be erroneous. In *Regina v. The Sheriff of Middlesex* (a), which was an application by the prosecutor for the costs of a mandamus, which had issued in a case of *Walker v. The Blackwall Railway Company* (b), it appeared that on the execution of an inquiry under the railway act, the sheriff stopped the case on a preliminary objection; and a rule was afterwards obtained, calling on the sheriff to shew cause why a mandamus should not issue, directing him to proceed with the inquiry; against which counsel, instructed by the railway company, who had succeeded before the sheriff, shewed cause. The rule was made absolute for a mandamus and the writ was obeyed. And it was held that the company could not be subjected to costs for supporting a judicial decision in their favour. Lord *Denman* in that case says (c), "we must follow the

(a) 5 Q. B. 365.

& D. 549.

(b) 3 Q. B. 744; S. C. 3 G.

(c) 5 Q. B. 366.

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general rule that, where a judicial decision has been given, the party who comes forward only to defend a judgment in his favour, and which he is entitled to suppose a right one, shall not pay costs." In that case the preliminary objection turned partly upon the insufficiency of the precepts issued to the sheriff, and partly upon the construction of the company's act of Parliament. Here the question arises upon the construction of the act of Parliament incorporating the company. It is impossible for the Court to make any distinction as to the degree of legal difficulty involved in each case. It is sufficient if the objection be *bonâ fide* made, and involve a question of law, to insure the party in whose favour it is decided, and who appears here to support that decision, from being visited with costs in case this Court be of a different opinion. It may be that if the objection were clearly frivolous, as it was held to be in the case of *Regina v. The Justices of Surrey (a)*, the Court will visit the party making it, and appearing to support it on an application for a mandamus, with the costs unnecessarily incurred through their means. So in the case of *Regina v. The Justices of London (b)*, where the objection in substance was that the appellants were bound to treat the notice of appeal as the grievance; and, having allowed the time to expire, could not appeal against the subsequent removal. But here the objection could not be deemed to be frivolous, turning as it did on the construction of the terms of an act of Parliament; and unless it was so palpably untenable, that the parties could not be supposed to have taken it *bonâ fide*, the Court will not force them to pay the costs. To establish a different rule, would be to place parties in extreme difficulty, who cannot tell when they may, with safety, defend the decisions of the inferior Court in their favour.

(a) Since reported, 9 Q. B. 37. Cited in the argument from 2 Car., Ham. & Allen's New Sess. Cases, 357; *nom. Reg. v. The Overseers of Osted*.
 (b) Since reported, 9 Q. B. 41. Cited in the argument from 2 Car., Ham. & Allen's New Sess. Cases, 568.

W. Greig, in support of the rule. Here the parties take an untenable objection in the Court below, and mislead the justices, and afterwards come to this Court and resist a mandamus to set them right. It is admitted that where there exists a reasonable difficulty in the construction of an act of Parliament, the parties in whose favour the decision of the quarter sessions is given, ought not to be visited with costs for supporting that decision, although ultimately pronounced by this Court to be erroneous. Here, however, the matter was too plain for argument, when the company's act came to be referred to, and the rule for the mandamus was made absolute, without the counsel in support of the rule being called upon. The cases of *Regina v. The Justices of Surrey*, and *Regina v. The Justices of London*, are express authorities in favour of the rule. The appellants have succeeded in reducing the rate appealed against from 170*l.* to 50*l.*

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REGINA v. The JUSTICES of LANCASHIRE.

IN this case a rule had been obtained, in Easter Term, 1848, calling upon the overseers of the parish of Ashton-under-Lyne, in the county of Lancaster, to shew cause why they should not pay to the overseers of the poor of the township of Butley, in the same county, the prosecutors in this prosecution, or to their attorney, the costs of and occasioned by the application for the writ of mandamus in this cause, and, consequent thereon, the costs of the writ, and the costs of this application.

The sessions having refused to hear the appeal on an objection to the sufficiency of the notice, and a mandamus compelling them to hear it, having been granted, (as reported, *ante*, p. 264), the appeal came on for trial at the

For marginal
note, see *ante*,
p. 430.

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Epiphany Sessions, 1848, and being heard on the merits, the order of removal was quashed. Whereupon the present rule was obtained, against which,

Townsend now shewed cause, and referred to the foregoing case and the decisions there cited.

Pashley was heard in support of the rule. He referred, in addition to the cases cited in the argument in the preceding case, to *Regina v. The Mayor of Newbury* (a), and *Regina v. Justices of Cheshire* (b).

Cur. adv. vult.

WIGHTMAN, J., afterwards delivered judgment.

There were two cases argued before me this Term, *The Queen v. The Justices of Cumberland*, and *The Queen v. The Justices of Lancashire*, which as they presented the same point, I have considered together. They were applications for the costs of writs of mandamus to Courts of Quarter Sessions, rendered necessary by decisions, which this Court considered erroneous, upon objections, taken by the parties, who shewed cause against the rules.

In each case this Court was of opinion, that the objection taken in the Court below was clearly ill and ought not to have prevailed; though it, perhaps, could hardly be said, that they were merely frivolous.

Each party relied upon a separate rule of practice with respect to costs as applicable to his case.

In support of the application for the costs, the general rule, that the costs of writs of mandamus, the issuing of

(a) 1 Q. B. 751; S. C. 1 G. & D. 388.

(b) *Ante*, p. 426.

which, is opposed, are given to the successful party, was relied upon; whilst on the other side, it was contended, that as a general rule costs were not given where the proceedings were rendered necessary by some mistake of the Court itself, and that though there were cases in which the costs of writs of mandamus to correct erroneous decisions of inferior Courts had been given to the parties applying for them—those were cases in which the objections, successfully taken in the Courts below, were so obviously untenable and frivolous, that they ought not to have been taken, and the parties might be considered as wilfully misleading the Court.

If this were so, and in order to obtain the costs of a mandamus, it were necessary for the successful party to shew that the objections taken in the Court below were obviously untenable and frivolous, very great practical inconvenience and uncertainty would follow; as it would in every case be necessary to discuss the merits of the previous decisions. But those cases, though the nature of the objections was incidentally discussed, appear to be founded upon a much more certain and convenient rule; that the party who succeeds in the Court below, upon an objection which turns out to be ill-founded, and resists an application for a mandamus to correct the error, by shewing cause against it, shall be subject to the application of the general rule for the payment of the costs by the unsuccessful party; subject to exceptions which the Court may make in particular cases in the exercise of their general jurisdiction over the costs.

Such a general rule would not be applicable to the case of a party, who having succeeded in the Court below, upon an erroneous judgment, offers no resistance to the correction of the error, and is no party to the proceedings in this Court, by shewing cause against the issuing the mandamus.

Upon the argument two cases were referred to; *Regina*

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v. *The Justices of Surrey* (a), and *Regina v. The Justices of London* (b). In the former case, the decision seems to have proceeded on the general ground that the costs of a mandamus are to follow the event, and not on the ground of the objection raised being frivolous; although Lord Denman does refer to that also in his judgment. Mr. Justice Patteson says, "the general rule certainly is, as mentioned by my Lord, that the costs follow the event of a mandamus. And I think there ought to be good cause for departing from it. I do not say that such a case may not exist, but I think this is not that case. It is said this is like a verdict set aside for misdirection, which is usually done without costs, and I was at first much struck by that argument; but it must be recollected that that is not always so, because where a Court has committed an error, and a writ of error is brought, the practice is that costs are given to the party bringing it." Mr. Justice Williams also says, "It seems to me that the resistance to the mandamus was an unnecessary act, because when the attention of the parties was called to the objection, they might have seen that there could be nothing in it, except you go the length of saying that both churchwardens and all the overseers must sign a notice of appeal." This case was followed by that of *Regina v. Justices of London*, which seems to have passed without much argument, and to have been decided on the ground that there was nothing in it to take it out of the general rule that the costs of the mandamus should abide the event. I see that in that case I felt the same difficulty which presents itself to my mind in all these cases, namely, that the decision of the inferior Court is what induces the party to resist a mandamus.

✓ (a) Since reported, 9 Q. B. 37. His Lordship cited the case from 2 Car., Ham. & Allen's New Sess. Cases, 357; *nom. Reg. v. The Overseers of Outed*.

(b) Since reported, 9 Q. B. 41. His Lordship cited the case from 2 Car., Ham. & Allen's New Sess. Cases, 568.

Now acting upon these decisions, it seems to me that there does not appear to be in the present cases, any sufficient ground for taking them out of the general rule, that parties unsuccessfully opposing the issuing of writs of mandamus shall pay the costs; they are parties to the proceedings in this Court as well as in the Court below, and, if unsuccessful in the proceedings here, are within the ordinary rule that the costs of the application for writs of mandamus, if opposed, will be given to the successful party.

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Rule absolute.

In re a Plaint or Suit in the County Court of Surrey,
Between J. P. FEARON and Another, Plaintiffs,
and
C. NORVALL, Defendant.

A RULE had been obtained, in last Michaelmas Term, calling upon the Judge of the County Court of Surrey, and the plaintiffs in the above suit, to shew cause why a writ of prohibition should not issue, directed to the said Judge of that Court, prohibiting him from proceeding further in the said action.

It appeared upon the affidavits that the plaintiffs in the above action were landlords, and the defendant, tenant of certain land, held under an agreement, at a yearly rent of 40*l*. That the agreement contained a clause, "that the tenant should on receiving a written notice to that effect, deliver up possession of the whole or such part of the said premises as might for the time being be required, within one calendar month next after such notice should have been delivered to him; and that, upon every such delivery up of possession, a proportionate deduction should be made of the rent thereby reserved, according to the quantity of

On motion for a prohibition to the Judge of a County Court: *Held*, that in a proceeding under the 122nd sect. of the 9 & 10 Vict. c. 95, the jurisdiction of the County Court is not ousted by the tenant appearing and shewing cause.

Held also, that the Judge of the County Court has jurisdiction to inquire whether the tenancy was determined by a legal notice to quit, and that his decision on that

fact is conclusive, and cannot be questioned on a motion for a prohibition.

See post. 447.
1. Reul. R. 260.
22. Law J. Rep. 96 (2P)
14. 2D. 714.

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ground so delivered up; and that in case any crop should be upon the ground delivered up pursuant to any such notice, a reasonable amount of compensation should be paid to the tenant." That under this stipulation, notices had been given in respect of several portions of the land which the defendant had duly delivered up. That various sums amounting altogether to 150*l.*, were due to the defendant for out-going crops, which he had not been paid. That at Michaelmas, 1846, a six months' notice to deliver up possession of the remainder of the premises was given him. That on the 6th of June, 1847, the defendant not having given up possession, a plaint was entered in the County Court, and a summons was served upon the defendant, calling upon him to shew cause why he should not deliver up possession of the residue of the premises to the plaintiffs. The defendant accordingly attended at the County Court on the 21st of July, and objected that the Judge had no jurisdiction to entertain the complaint. The Judge, however, overruled the objection, heard the case, and decided it in the plaintiffs' favour, making an order that the defendant should give up possession, on the 24th of December then next.

Bovill now shewed cause. This rule was obtained on two grounds; first, that the Judge of the County Court, had no jurisdiction, under the Small Debts' Act, 9 & 10 Vict. c. 95, s. 122, to decide this case, the defendant having appeared to shew cause; and secondly, that the tenancy had not been duly determined by a notice to quit, and that, therefore, the Judge had acted without jurisdiction. It is submitted as to the first point, that the construction sought to be put upon the 122nd section (*a*), would entirely

(*a*) 9 & 10 Vict. c. 95, s. 122.
 "And be it enacted, that when and so soon as the term and interest of the tenant of any house, land, or other corporeal her-

editament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of fifty pounds by the year, and upon which no

defeat the object of that section. It says, "if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew cause to the contrary," &c.; plainly, therefore, contemplating the case of the tenant appearing and shewing cause. [He was then stopped by the Court, who called upon]

fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the County Court to be holden under this act, and thereupon a summons shall issue to the person so neglecting or refusing; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew cause to the contrary, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to the Court proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of the service of

the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the Judge to issue a warrant under the seal of the Court to any bailiff of the Court, requiring and authorizing him, within a period to be therein named, not less than seven or more than ten clear days from the date of such warrant, to give possession of the premises to such landlord or agent; and such warrant shall be a sufficient warrant to the said bailiff to enter upon the premises, with such assistants as he shall deem necessary, and to give possession accordingly: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from any action which may be brought against him by any such tenant or occupier for or in respect of such entry and taking possession, where such person had not, at the time of suing out the same as aforesaid, lawful right to the possession of the same premises."

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Otter and Hugh Hill to support the rule. It is submitted, that it was the intention of the Legislature, that if the tenant appeared to shew cause, the jurisdiction of the County Court should be at an end; otherwise the alternative would have been provided for in the section. The 122nd section only provides for the case of a tenant to whom notice to quit has been given, or whose term has expired, not appearing to shew cause. The 58th section, which defines the general jurisdiction of the Court, expressly provides, "that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments," &c. "shall be in question." The act must be so construed as to make all the sections consistent. Now it is clear that if the County Court is to adjudicate, where cause is shewn, under the 122nd section, they may be called upon to decide questions of title of an abstruse nature. [*Erle, J.*—The Legislature could surely never have intended that all the machinery of this section should be set at nought by the tenant simply appearing and refusing to consent to the proceedings]. The framers of the act probably merely contemplated cases of vacant possession; as by the 123rd section it is provided that the summons is to be left at "the place of abode" of the tenant, not at the premises themselves. [*Erle, J.*—That may be to meet the case, where the premises consist simply of lands upon which there is no house.] The words of the 122nd section are taken almost verbatim from the 1 & 2 Vict. c. 74, s. 1, which gives power to justices in certain cases to summon the tenant before them and to order him to deliver up possession of the premises; except that instead of the words "and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew cause to the contrary," &c., the words used in the 1 & 2 Vict. c. 74, s. 1, are, "and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew to the satisfaction of the justices hereinafter mentioned,

reasonable cause why possession should not be given under the provisions of this act," &c. The omission of these words in the later statute, coupled with the language of the 58th section, would therefore seem to shew, that it was not the intention of the statute to confer upon the County Court any jurisdiction where the sufficiency of the notice to quit was in dispute; but only in cases where the premises were vacant, or the determination of the tenancy, by expiration of the term or by notice to quit, was not contested. It is submitted, secondly, that in order to give the Judge of the County Court jurisdiction, it must appear that the tenancy has been "duly determined by a legal notice to quit." Here the notice was a six months' notice to quit, which under the peculiar terms of the agreement was not a legal notice. [*Erle, J.*—Does not this case come within the rule laid down in *Reg. v. Bolton (a)*, that if magistrates have power to enter into an inquiry, this Court will not review their decision on the facts?] It is submitted it does not. Here the statute specifies as one of the facts necessary to give the Court jurisdiction that the tenancy should have ended, or been "duly determined by a legal notice to quit;" and the scope of the act, which gives no power of appeal to a superior Court, was that difficult questions of law should not be decided by the County Court. In *Reg. v. Bolton (b)*, the warrant of the justices was abundant protection to those acting under it. Here trespass may be brought notwithstanding against the party suing it out.

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Cur. adv. vult.

In the Vacation after this Term (*b*),

ERLE, J., delivered judgment.—In this case a rule for a prohibition to the County Court of Surrey, was moved for

✓ (*a*) 1 Q. B. 66; S. C. 4 P. & D. 679.

(*b*) On the 26th of February, 1848.

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on two grounds; first, that the Judge had no jurisdiction to proceed, under the 9 & 10 Vict. c. 95, s. 122, where the tenant appeared and shewed any cause against proceeding, whether good or bad. The words of the statute are, "if the tenant" "shall not appear," "and shew cause to the contrary;" and in my opinion those words require the tenant to shew such cause as constitutes in the opinion of the Judge a defence. The construction contended for would render this part of the statute nugatory.

The second ground was, that the notice to quit proved by the landlord did not determine the tenancy; that the Judge had no jurisdiction unless the tenancy was determined by a legal notice to quit; and that his mistaken decision upon a fact of jurisdiction was of no avail.

It is unnecessary to say whether the Judge's decision on the fact was right, because it is clear that he had jurisdiction over the question of fact, and that it was his duty to commence the inquiry; and therefore his decision is now conclusive; *Reg. v. Bolton* (a).

Rule discharged, with costs (b).

✓ (a) 1 Q. B. 66.

(b) See this case again on another point, on the opposite page.

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In re a second Plaintiff or Suit in the same Court
between the same Parties (a).

A RULE had been obtained in Trinity Term, 1848; calling upon the Judge of the County Court of Surrey, and the plaintiffs in the above suit, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the said Judge, High Bailiff, and other officers of the said Court, from further proceeding in the plaint or action in that Court between John Peter Fearon and James Sebastian Yeats, plaintiffs, and Charles Norvall, defendant; and from carrying into execution, or otherwise giving effect, to the judgment therein of that Court.

In this case, a plaint having been entered before the Judge of the County Court of Surrey, to recover possession of certain lands under the 122nd section of the Small Debts Act (9 & 10 Vict. c. 95), and the Judge of the County Court having, on the 21st of July, 1847, decided the plaint in favour of the plaintiffs, and a writ of prohibition having been applied for and refused in Hilary Term last (see the case reported, *ante*, p. 439), it now appeared that the judgment so given by the Judge was, that possession of the lands should be delivered up to the plaintiffs on the 24th of December following; that it had been duly entered, and that nothing had been done upon that judgment, the plaintiffs having been advised by counsel not to draw up a warrant for execution thereon, as the judgment could not

On the 21st of July, 1847, the Judge of a County Court, in a plaint under the 122nd sect. of the County Court Act, (9 & 10 Vict. c. 95), gave judgment that the defendant should deliver up possession of the premises on the 24th of December following. No warrant of possession was drawn up or executed. On the 31st of May, 1848, a fresh plaint was brought to recover possession of the same premises, between the same parties, on the same notice to quit; and judgment given in the plaintiffs' favour.

Held, on motion for a prohibition, that as the rules and forms framed by the Judges under

(a) This case was decided in Michaelmas Term, 1848.

the 78th sect. of the act contain a form of a judgment (No. 30) which orders possession to be delivered "forthwith," the Judge had no authority to pronounce a different judgment; that the first judgment was therefore a nullity, and that the plaintiffs might treat it as such, and institute the second plaint; and that they were not bound to apply to the Judge of the County Court to amend his former judgment.

It is sufficient to bring a case within the 122nd sect., that the yearly rent is under the value of 50*l*., and that no fine has been paid; even if the actual value of the premises be beyond that sum. //

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be supported. That the defendant had since been served with a fresh summons to appear at the County Court on the 30th of May, 1848, to shew cause why he should not deliver up the same premises. That the summons came on for hearing on the 31st of May, and that the defendant attended by his counsel and objected to the jurisdiction of the Court, on the ground that the previous action had been brought for the recovery of the same premises and judgment given, which was still in force; and also on the ground, that the annual value of the said land exceeded 50*l*. That on the hearing of the summons the plaintiffs gave the same facts in evidence, in proof of the same notice to quit, as on the hearing on the 21st of July, 1847; and that the relationship between the plaintiffs and the defendant was not in any way altered or varied between the said 21st of July, 1847, and 31st of May, 1848. That the Judge overruled the objections, and gave judgment for the plaintiffs. That a warrant of possession had issued, and possession been given to the plaintiffs, before the present rule was obtained. There was an affidavit that the lands were of the annual value of 65*l* for agricultural purposes.

Bovill now shewed cause. The first ground of objection which is urged in support of this rule is, that the annual value of the premises in question exceeds 50*l* by the year. That is not sufficient to oust the jurisdiction of the County Court under the 122nd section, which gives the Judge power, "where the value of the premises, *or* the rent payable in respect of such tenancy," does "not exceed the sum of fifty pounds by the year, and upon which no fine shall have been paid." Here it is not alleged that any fine has been paid, or that the rent exceeds 50*l* by the year; the defendant has, therefore, only negatived one of two alternatives, in either of which the Judge has jurisdiction. Besides, if it were necessary to argue the point, the affidavit is not even sufficient as to the annual value. The second

ground of objection is, that a prior judgment of recovery of possession of the same premises had been given, and was still in force and unreversed. A sufficient answer, perhaps, might be found to this objection, in the fact, that there is nothing in the act to prevent a party from recovering twice against the tenant, no more than in the analogous proceeding by ejectment in the superior Courts; and the first judgment in the plaintiffs' favour, so far from operating as a bar on the second occasion, would be evidence for him of a prior recovery: but the plaintiffs rely on the fact, that the judgment of the 31st of May, 1847, being inoperative, by reason of its not being in conformity with the powers conferred on the Judge by the act, it is the same as if no judgment at all had been given. The 122nd section says,—“it shall be lawful for the Judge to issue a warrant, under the seal of the Court, to any bailiff of the Court, requiring and authorizing him, within a period to be therein named, not less than seven or more than ten clear days, from the date of such warrant, to give possession of the premises to such landlord or agent.” The rules and forms framed by the Judges under the 78th section, and which have the force of a statute, contain a form (No. 30) of judgment for recovery of a tenement. In that form the judgment is, “that the defendant do *forthwith* quit and deliver up possession,” &c. “and that a warrant do *forthwith* issue,” &c. The Judge, therefore, had no power to order possession to be delivered up at a future time; and the case of *Jones v. Jones* (a) seems to shew, that the judgment having been once pronounced, the Judge had no power afterwards to alter it at the instance of the plaintiffs. [*Patteson, J.*—But for the decision come to by my Brother *Erle* in this case (b), I should have been inclined to hold that the 122nd section did not apply to a case where the

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(a) Bail Court, Easter Term, 1848, *post*.

✓ (b) *Ante*, p. 439.

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tenant appears to shew cause, but only to undefended cases; and if so, a judgment in its strict sense of a decision between contending claims would scarcely be required.] The forms framed by the Judges under the 78th section, shew that a judgment is to be given in this as in other cases. There is a further objection to the present application, that the defendant has taken part in the proceedings before the Judge on the second summons, and might have had a decision in his favour, and therefore cannot come here, now that judgment has been given against him, to set it aside; *Full v. Hutchins* (a); *Buggin v. Bennett* (b); *Richetts v. Bodenham* (c). There is a further answer also, that the statute itself has pointed out the mode of objecting to the decision of the Judge under the 122nd section; for, by that section, it is enacted, "that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession," &c.; and by the 126th section, the suing out the warrant of possession is to be deemed a constructive act of trespass, and on his entering into a bond to sue, the warrant is to be stayed; and by the 127th section, the proceedings on such bond are regulated. [*Patteson, J.*—If the tenant appears under the 122nd section, would he be entitled to have a jury summoned as in other cases? If so, who ever heard of an action of trespass against a party for issuing execution where a verdict and judgment have been given in his favour?] The object of this provision, no doubt, was to carry out the general scope of the Act, that the Court should have no power over cases in which the title to lands, &c. was involved.

Davis, in support of the rule. It is admitted that, upon

(a) 1 Cowp. 422.
 / (b) 4 Burr. 2035.

/ (c) 4 A. & E. 433; S. C. 6 N. & M. 170.

the affidavits, it does not clearly appear that the value is more than 50*l*. a year, and therefore that ground of objection will not be insisted on. As to the second ground, it is submitted that the first judgment was not invalid. The form is only given by way of assistance to the Judge, and there is no provision in the statute itself that execution should issue forthwith. By the 78th section, in all cases not provided for by the rules, "the general principles of practice in the superior Courts of Common Law may be adopted and applied, at the discretion of the Judges, to actions and proceedings in their several Courts;" and there is no doubt that a judgment of one of the superior Courts in the form used would have been valid. However, even if the Court be of a different opinion, the proper course for the plaintiffs to have pursued, would have been to have taken out a summons before the Judge of the County Court, calling on the defendant to shew cause why the judgment should not be amended. The Judges of the superior Courts may alter their judgment any time within the Term within which it is pronounced, and the Judge of a County Court must have some discretionary power in this respect. The defendant attended to protest against the jurisdiction of the Judge on the second occasion. The remedy by action of trespass does not preclude the defendant from coming to this Court for a prohibition where the Judge has exceeded his jurisdiction.

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PATTERSON, J.—As to the first point, Mr. Davis says he will not press that objection; but if I were called upon for a decision, I should have no hesitation in holding, that if the rent is under 50*l*. and no fine has been paid, it does not matter how great the value of the premises may be. I have no doubt upon the subject.

As to the other objection, I will take time to consider.

Cur. adv. vult.

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PATTESON, J.—The first ground of objection, I think, was disposed of on the argument.

The second ground of objection was, that there was a previous judgment existing between the same parties on the same matter, and therefore that the subsequent proceedings were without authority.

I expressed some doubt, in the course of the argument, as to the 122nd section applying to cases where the tenant appears and shews cause; and therefore whether any adjudication at all, under these circumstances, could take place; but the learned Judges seem, from the language of the form framed upon that section, to have considered it as so applying; and my Brother *Erle* has so held in the present case (*a*); and, therefore, I think I must decide in conformity with the view thus taken.

Then as to the former proceedings in this case, it seems that it was the intention of the rules that the Judge should adjudicate on the rights between the landlord and tenant, and that possession should be delivered up forthwith; that is to say, that the warrant of possession should issue forthwith, for possession to be given up within ten days from the date of the warrant. Here the judgment is pronounced on the 21st of July, 1847, and it orders that possession shall be delivered up on the 24th of December following, and therefore is clearly made without jurisdiction.

The answer to the subsequent proceedings is in the nature of a plea of judgment recovered. Although a judgment of the superior Courts is to be taken as valid until reversed by writ of error, yet here there can be no writ of error or other proceeding by which the validity of the judgment can be called in question. I should, therefore, be sorry to say, that, although the first judgment was irregular, and could not be acted upon; yet the plaintiff is deprived of the power of going before the Court again on a fresh plaint. I therefore think, that I must consider

✓(*a*) *Ante*, p. 439.

whether there was any judgment at all here; and I am of opinion that the first judgment was one which the Judge of the County Court was not authorized to make, and was a nullity. It follows that the rule must be discharged, and with costs.

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Rule discharged, with costs.

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A RULE had been obtained in Michaelmas Term last, calling upon the defendants to shew cause why a rule which had been obtained for costs of the day, for not proceeding to trial pursuant to notice, should not be discharged.

The rule for costs of the day had been obtained upon an affidavit of the clerk of the defendants' attorneys, that issue was joined in this cause on the 11th of June, 1842, and notice of trial given for the Summer Assizes, holden at Brecon, in and for the county of Brecon. That the cause was called on for trial at such assizes and the defendants appeared by their counsel, but the same was not tried in consequence of the record being imperfect, there being no replication to the second plea and the award of the venire having been omitted. It also stated in the usual form, that notice had been given to the plaintiff's attorney that this motion would be made.

The affidavit on which the present rule was obtained, was made by the plaintiffs' attorney, and stated that the action was brought for an alleged breach of an agreement, and that the issue was duly delivered, and notice of trial

After the jury were sworn to try a cause, it was discovered, that through the mistake of the clerk of the plaintiffs' attorney, a replication to one of the pleas, and the award of venire, were omitted in the nisi prius record; although the issue delivered was correct.

Held, that the Judge had power to amend the record with the consent of the parties.

The defendants having refused to give their consent to any amendment being made, and the Judge at nisi prius having thereupon ordered the

jury to be discharged; the Court refused, in the exercise of their discretion, to grant the defendants the costs of the day.

The rule for costs of the day being a rule absolute in the first instance, the opposite party is not bound to appear to shew cause, although notice of the motion may be given to him; but may come afterwards and move to discharge the rule.

29. 12. 42. 211. (cp)

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given for the Summer Assizes for Brecon. That after delivery of the issue, various summonses were taken out by the plaintiffs and the defendants respectively, for admission of documents, &c., and admissions on both sides were accordingly made. That the cause was made a special jury cause at the instance of the plaintiffs, and that the venire and distringas for a common jury, as also a special distringas for the special jury, were duly issued out of this Court and returned by the sheriff of Brecon for the said assizes. That in accordance with the said notice of trial, deponent as the attorney for the above named plaintiffs, attended the said assizes with various witnesses for the purpose of proving the plaintiffs' case, and that he delivered briefs to counsel in the said cause on behalf of the plaintiffs; and that the attorneys or agents for the defendants also attended the said assizes with their witnesses to be also examined on the said trial, and that briefs were also delivered to counsel on behalf of the defendants. That on the 28th of July last, the cause was duly called on for trial at the said assizes, and the said special jury duly sworn and empanelled to try the said cause, who were afterwards paid their fees by him for so attending the trial to try the cause. That after the special jury had been so sworn and empanelled to try the said cause, and after the case had been opened on the part of the plaintiffs, the learned Judge who presided at the trial, discovered an error in the record, by an omission, by the clerk who copied the same, of the replication (a) to the second plea of the defendants, and also the award of the venire in the engrossment of the nisi prius record which was then before his Lordship; but upon reference to the issue delivered in this case to the said defendants, and then produced by their counsel, no such omissions were found, and the said issue was found to be correct. That the plaintiffs' counsel applied to the defendants' counsel for their consent to amend the record, by

(a) See note (a), *post*, p. 454.

inserting the said omissions, the learned Judge having stated that, without such consent, he could not assist the plaintiffs by adding the award of the venire; but the counsel for the said defendants refused his consent thereto. That on the refusal of the counsel on the part of the defendants to consent to or to allow the said amendments, the learned Judge, who appeared, to the deponent, to be desirous of assisting the justice of the case, and to prevent the expense of taking the witnesses again to the assizes, said to the defendants' counsel, that if they did not consent to and allow the said amendments to be made, he should discharge the jury; intimating thereby, as deponent understood and verily believed, that he should leave each party to pay his own costs, viz. the plaintiffs for having committed the error, and the defendants for not consenting to remedy the same, the witnesses on both sides being present in Court. That the Judge, in consequence of the defendants not so consenting to the amendment of the record, and for no other reason, as deponent believes, did accordingly discharge the said special jury, and the discharge was then endorsed on the back of the record by the proper officer of the Court in the following words, "Jury discharged." That the plaintiffs were ready and willing to have then tried the cause. That the defendants would not have been prejudiced by the amendments having been made, as the issue to be tried was one of fact and not of law; and that the defendants could not have been misled, for the issue delivered to them was correct. That the omissions aforesaid in the nisi prius record were nothing more than the clerical omission and errors of a clerk in the office of deponent, who had to engross the said record.

The affidavit in answer, which was made by the agent of the defendants' attorney, who was present at the trial, gave this account of what passed. "That the jury having been sworn, on the pleadings being opened by the junior counsel of the plaintiffs, Mr. Justice *Cresswell*, who was the presiding Judge, discovered that there was not on the record any replication to the second plea of the defendants. That

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thereupon the counsel for the plaintiffs applied to the Judge to amend the record by the issue delivered. That the Judge replied, 'The jury being sworn and the cause on, I cannot amend without consent, unless some authority is shewn me justifying this amendment.' That thereupon the counsel for the defendants said, 'I consider that the amendment cannot be made with or without consent.' That the Judge then addressing counsel for the defendants, asked, 'Will you consent, if we find that the amendment can be made?' That the counsel for the defendants replied, 'Certainly, I will consent, if your Lordship can give any assurance that all the proceedings will not be a nullity after the amendment.' That the Judge said in answer, 'I can give you no such assurance.' That the counsel for the plaintiffs thereupon said, 'We are ready to try the one issue which we have here.' That the Judge replied, 'What is the use of trying half a record?' That the counsel for the plaintiffs then said, 'The Court would add a similiter, why not add a replication de injuriâ?' (a) That the Judge replied, 'Want of power is my only difficulty.' That the Judge then read a note of all the cases, and immediately afterwards said, 'I find *Rowlinson v. Roaintre*, 6 C. & P. 551, is an authority against the amendment.' That thereupon the counsel for the plaintiffs said, 'I propose to make the amendment in invitum.' That the Judge then inquired, 'What is the award of venire? Is the jury summoned to try the issue or issues joined?' That it was then discovered for the first time, in consequence of such inquiry, that there was no award of the venire. That his Lordship then said, 'If the Judge at nisi prius can amend the issue, he has no power to order an amendment of the venire' (b). That the counsel for the

(a) It did not appear upon the affidavits, except by implication from the above statement, what the omitted replication was; but in point of fact it was the replication de injuriâ to a special plea

in excuse, and the similiter thereto.

(b) See, however, the plaintiffs' account of what fell from the learned Judge on this occasion, *ante*, p. 453.

plaintiffs then explained the cause of the mistake, stating that the record was an old one, and that the delay had been caused by a distressing illness ending in the death of a material witness. That the counsel for the defendants objected to any such explanations, and then added, 'We will consent to their withdrawing the record.' That the plaintiffs' counsel and solicitor then consulted together and no proposal being made, the Judge then said, 'I will not try a cause where there is no award of venire sent to me. I shall take upon myself to discharge the jury, and it must be considered that they have been sworn per incuriam;' and the jury was then discharged accordingly." It was denied that any application to amend the record was made by the plaintiffs' counsel, but only to amend in respect of the want of a replication to the second plea; or that the Judge had intimated in any manner that he should leave each party to pay their own costs.

Chilton and *Benson* now shewed cause. It is submitted that there is a preliminary objection, that the plaintiffs are too late in their present application. The rule for costs of the day was obtained upon an affidavit which substantially discloses all the facts of the case, and notice of that rule was given to the plaintiffs. Although, therefore, it is a rule absolute in the first instance, the plaintiffs should have shewn cause against its being granted, as all the facts were disclosed on the affidavit on which it was moved. [*Erle, J.*—I do not think you can insist upon this objection. It seems to be the practice in this Court, that although notice be given that the rule will be moved for, the other side are not bound to take any step to oppose it, but may afterwards come to the Court to ask to have it discharged.] Then as to the present rule, it is submitted, first, that the Judge at nisi prius had no power to make the amendments required; and, secondly, that even if he had, the defendants' refusal to consent to the amendment being made, did not take away their right to the costs of the day. As to the

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first point, the case of *Adams v. Power* (a), is an express authority. There Mr. Baron *Bolland* held, that as a Judge sitting at nisi prius he had no power to order an amendment of the award of the venire facias on the nisi prius record. In *Clark v. Nicholson* (b) a similiter was omitted. Mr. Baron *Parke* was, however, of opinion, that as there was an "&c." where the similiter ought to have been, it was sufficient to justify him in trying the case, which he accordingly did. The proper rule with regard to the power of Judges sitting at nisi prius, to make amendments, it is submitted, is, that they cannot order an amendment, after the jury is sworn, except of some matter which may be given in evidence on the trial; and a class of cases, of which *Cox v. Painter* (c) is an example, where the time of the suing out of the writ was not stated in the nisi prius record, and the Judge at the trial allowed the plaintiff to amend by annexing the writ to the record, will be found not to militate against the view here taken. The case of *Gee v. Swann* (d), should it be cited on the other side, is distinguishable, as there the Court only decided that the defect, namely, that a *distringas juratores* had not been returned by the sheriff before the trial, was one of which the defendant might avail himself on a writ of error, and therefore they refused to set aside the verdict, or award a venire de novo. [They referred also to *Bent v. Benyon* (e); *Rowlinson v. Roaintre* (f)]. As to the second point, the case of *Cook v. Smith* (g), shews that the defendants do not lose their right to the costs of the day by not consenting to the amendment. The plaintiffs are bound, after notice given, to proceed to trial; and any neglect or omission on their part, unless it arises from the act of the Court, or inevitable accident, renders them liable to the defendants for the costs of the day to which they have been put. In the

(a) 7 C. & P. 76.

896, N. S.

(b) 6 C. & P. 712.

(e) 6 C. & P. 217.

(c) 7 C. & P. 767.

(f) Ibid. p. 551.

✓(d) 9 M. & W. 685; 1 Dowl.

✓(g) 1 Dowl. 861, N. S.

case cited it was held, that where a plaintiff gives notice of trial for one sittings in Term, but the cause does not come on then, and is made a remanet to the next sittings, and not being resealed, cannot then be tried without consent, and the defendant refuses to consent and no trial takes place, the defendant is, notwithstanding, entitled to the costs of the day. There Mr. Justice *Coleridge* says,—“The trial ought not to take place if there is any doubt as to whether it would be good, or whether the witnesses, in case of wilful mis-statement, would be liable to be indicted for perjury. It is not shewn that the record could have been used for the trial with certainty that the trial would be good. But I do not know that it is necessary to decide the case on that point. It appears that the plaintiff was in fault, and unless the defendant was in fault, he is entitled to his costs.” So in *Blow v. Wyatt (a)*, it was held, that when a cause was taken down to trial by both parties, and the plaintiff withdrew his record, the defendant was entitled to the costs of the day, although he might have proceeded to try the cause upon his own entry of it by proviso. If, indeed, the issue delivered had been imperfect, the defendants might have been bound to have objected to it before going down to trial, and, not having done so, have been precluded from asking for costs of the day. Suppose the plaintiffs had, by mistake, sent down the record in some other case, endorsed as in the present case, and the marshal, in the press of business, had not abstracted the record or detected the mistake till after the jury were sworn, it surely could not be contended that the defendants would not be entitled to the costs of the day, occasioned by the plaintiffs’ mistake. In *Ouchterlony v. Gibson (b)*, where, after error brought, the Court allowed the process of venire and habeas corpora in the nisi prius record to be amended by inserting the date, there was something to amend by.

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✓ (a) 4 M. & W. 407; S. C. 7 Scott, N. R. 448; 2 Dowl. 101,
 Dowl. 86. N. S.

✓ (b) 4 M. & G. 461; S. C. 5

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Evans, Ball, and Davison, in support of the rule. A plaintiff is not liable for the costs of the day, unless the trial prove abortive through his wilful default; *Ogle v. Moffatt* (a). [*Erle, J.*—The whole force of the decision in that case seems to turn on the plaintiff being an executor.] Reg. Gen. Mich. Term. 1654, r. 18, gives costs to the defendant if the plaintiff do not proceed to trial, in pursuance of his notice, unless the plaintiff countermands his notice, or “shews cause to be allowed in the Court in excuse of such costs.” In *Mullings v. —* (b), it was held that a plaintiff in several cases, who, by the event of one verdict, perceives that he cannot have a fair trial in the others, may reasonably withdraw his record, without subjecting himself either to judgment, as in case of a nonsuit, or to the defendant’s costs of the day of trial, upon the rule for such judgment being discharged. [*Erle, J.*—There must obviously have been something more in that case than appears in the report.] Where the jury is discharged by the Judge of his own authority, and not by consent of the parties, the rule is, that each party pays their own costs; *Waite v. Spurgin* (c). There *Patteson, J.*, says,—“This point was settled in the case of *Seeley v. Powers* (d). There, it was held, that if a Judge, of his own authority, discharges a jury from giving a verdict, on the ground of their not being able to agree, the party ultimately successful will not be entitled to the costs of the first attempt at trial. That was a decision of my own, but I took time to consider, and examined the authorities on the subject, and the result of my inquiries was, that the ultimately successful party was not entitled to costs attendant on endeavouring to try the cause.” The defendants ought to have objected to the jury being discharged. In *Everett v. Youells* (e), discharging a jury by consent is put on the same footing as withdrawing a juror; and it is clear, in the latter case, that each party pays his

✓(a) *Barnes*, 133.

✓(b) 5 *Taunt.* 88.

✓(c) 4 *Dowl.* 575.

(d) 3 *Dowl.* 372.

(e) 3 *B. & Ad.* 349.

own costs. The form of the affidavit for costs of the day shews that it does not apply to a case where a jury has been sworn and discharged, as it is for costs "for not proceeding to trial." The case of *Bent v. Benyon* (a) shews, that if the defendants had consented, the amendment might have been made and the jury re-sworn. Mr. Justice *Parke* there says,—“If you will consent on both sides to the amendment, the jury may be re-sworn; if not, they must be discharged.” The record might have been amended by the issue. The case of *Cook v. Smith* (b) differs widely from the present. There the jury had not been sworn, and the trial would have been a nullity without the record being re-sealed. The expressions attributed to the learned Judge in that case seem to lay down too broad a rule. [They referred also to the *Bishop of Worcester's case* (c); and *Child v. Harvey* (d)].

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Cur. adv. vult.

ERLE, J.—In this case it appears that the Judge discharged the jury by reason of a defect on the *nisi prius* record, which might have been amended, if the defendants had consented.

The defendants afterwards obtained a rule for costs of the day, and the question now is, whether those costs should be allowed?

It is clear from the authorities cited, that the Court has a discretion in respect of these costs, and I am of opinion that this discretion ought to be exercised in withholding them from the defendants, for they improperly caused the waste by refusing their consent to amend.

Rule absolute.

(a) 6 C. & P. 217, 218.

✓ (b) 1 Dowl. 861, N. S.

✓ (c) 1 Salk. 48.

✓ (d) *Ibid.*

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STINDT v. ROBERTS and Another.

Where a bill of lading stipulates on the face of it for payment of demurrage, the indorsee, taking goods under it, is liable for demurrage.

Assumpsit. The declaration recited that certain goods had been shipped on board the plaintiff's vessel by Messrs. R. & Co., to be delivered in this country according to the terms of the bill of lading, to the order of R. & Co., or their assigns paying freight and 2l. 10s. per day demurrage over four working days: it averred that R. & Co. indorsed and assigned over the bill of lading to

A RULE had been obtained in Michaelmas Term last, calling upon the plaintiff to shew cause why the verdict obtained in this cause before the sheriff of the town and county of the town of Kingston-upon-Hull should not be set aside, and a new trial had between the parties; or why the judgment in this cause should not be arrested.

The action was in *assumpsit* for demurrage by the plaintiff, the captain and owner of a vessel, against the defendants the indorsees of a bill of lading. The declaration stated, that the plaintiff, before and at the time of the making of the promise and during all the times hereinafter in this count mentioned, was, and still is, the owner and master of a certain schooner or vessel called the *Courier*. That also heretofore and before the making of the promise hereinafter mentioned, to wit, on the 10th day of March, A. D. 1847, certain cattle bones, to wit, 101 tons of best dry cattle bones had been and were shipped in good order and well conditioned, in and upon the said schooner of the plaintiff, then riding at anchor at *Elsfleth*, and bound for the port of *Hull*, and whereof the plaintiff was and is master as aforesaid, by certain persons trading in parts beyond the seas, to wit, at *Bremen*, under the name, style, and firm of *Rosing and Co.*, and whose names are not otherwise known to the plaintiff, to be carried and conveyed from

the defendants; and that "in consideration of the premises, and that the plaintiff at the request of the defendants would deliver unto the defendants as such indorsees and assignees as aforesaid, and would suffer and permit them to take the said cattle bones according to the terms of, and agreeably to, the bill of lading; the defendants then promised the plaintiff to accept and take the said cattle bones on the terms and conditions contained in the said bill of lading," and to clear the vessel within four days, or pay 2l. 10s. for each day beyond for demurrage. That although plaintiff was ready and willing to deliver, and permitted the defendants to take, and defendants did take the cattle bones; yet the defendants did not discharge the vessel within four working days, but detained her for three days beyond, whereby the plaintiff was put to great costs and charges, &c., and a large sum of money became due to the plaintiff, by way of demurrage, which the defendants had not paid, &c., to the plaintiff's damage, &c.

At the trial, the plaintiff proved all the facts stated in the declaration except an express promise by the defendants: *Held*, that the facts proved warranted the jury in finding that the defendants did promise; and, therefore, that the evidence supported the declaration.

The improper reception of evidence when the fact is fully proved *alundè*, is no ground for a new trial.

Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration.

Elsfleth aforesaid, and delivered upon the terms and conditions contained in and agreeably to a certain bill of lading in that behalf, made and signed for the same by the plaintiff and bearing date, to wit, the day and year last aforesaid, that is to say, upon the terms following, to be delivered in the like good order and well conditioned at the aforesaid port of Hull (the dangers and accidents of the seas excepted), unto the order of the said Rosing and Company or to their assignees, they paying freight for the said goods, at the rate of 15*s.* 9*d.* per ton of 2240 lbs. and gratuity of 1*l.* 19*s.* 6*d.*, with per cent. primage and average accustomed; the vessel to be discharged in four working days, or 2*l.* 10*s.* per day to be paid for laying days. That also within a reasonable time after the said cattle bones were so shipped as aforesaid, to wit, on the day and year aforesaid, the said vessel did, with all convenient speed, sail and proceed from Elsfleth aforesaid, to the said port of Hull, having the said cattle bones on board thereof; and did afterwards, to wit, on the 17th day of March, in the year aforesaid, arrive at the said port of Hull, with the said cattle bones on board, in the like good order and well conditioned as aforesaid; whereof the said Rosing and Company and the defendants then had notice. And the plaintiff, in fact, says, that after the signing of the said bill of lading as aforesaid, and before the detention thereof, hereinafter mentioned, to wit, the day and year last aforesaid, the said Rosing and Company, duly indorsed and signed the said bill of lading so made and signed as aforesaid, to the defendants, and the defendants then became and were indorsees of the said bill of lading and the assignees of the said cattle bones, and entitled to have and receive the same under and by virtue of the said bill of lading. And thereupon afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendants, would deliver unto the defendants as such indorsees and assignees as aforesaid, and would suffer and permit them to take the

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said cattle bones according to the terms of and agreeably to the said bill of lading, the defendants then promised the plaintiff to accept and take the said cattle bones on the terms and conditions contained in the said bill of lading in that behalf, and agreeably thereunto, and to discharge the said schooner or vessel in four working days or to pay to the plaintiff 2*l.* 10*s.* per day for laying days for the detention of the said vessel beyond the four working days so allowed for the discharge thereof, as in the said bill of lading is mentioned and provided for as aforesaid. And the plaintiff avers, that he the plaintiff, hath always performed, observed, and fulfilled all things in the said bill of lading on his part, to be observed, performed, and fulfilled, and that he the said plaintiff was always on and from the time of the said arrival of the said vessel as aforesaid, until the discharge, ready and willing to deliver the said cattle bones to the order of the said Rosing and Company, or their assignees, pursuant to the said bill of lading, and to the defendants, as assignees and indorsees as aforesaid, from the time of the making of the said promise; and did afterwards, to wit, on the day and year last aforesaid, deliver to and suffer and permit the defendants, as such indorsees and assignees as aforesaid, to take, and the defendants thereupon afterwards, to wit, on the day and year last aforesaid, took, had, and received of and from the plaintiff, the said cattle bones upon the terms contained in the said bill of lading mentioned and agreeably thereto. Yet the defendants disregarding their said promise, did not, nor would discharge the said vessel within the said four working days so allowed for the discharge thereof as aforesaid; but on the contrary thereof, the plaintiff says that the defendants kept and detained the said vessel, with the said cattle bones on board thereof and before she was discharged by the defendants, over and above and after the said four working days, at the port of Hull aforesaid, for a long time, to wit, for the space of three laying days, which said space of three days had elapsed long before the commencement of this suit; whereby the plaintiff was put to great costs,

charges, and expenses, amounting, to wit, to the sum of 20*l.*, in and about maintaining and keeping the master and mariners of the said vessel, and during that time lost and was deprived of the use and profit of the said vessel; and the plaintiff further says, that by reason of the premises, a large sum of money, to wit, the sum of 7*l.* 10*s.* became and was due and payable to the plaintiff by the defendants, pursuant to their said promise in that behalf, as and for the detention of the said vessel at the port of Hull aforesaid, for the said three laying days over and above the said four working days allowed for the discharge thereof as aforesaid, whereof the defendants then had notice. Yet the defendants not regarding their said promise in that behalf, have not as yet paid the said sum of 7*l.* 10*s.* or any part thereof to the plaintiff; but so to do have wholly neglected and refused, contrary to their said agreement and promise in that behalf; to the damage of the plaintiff of 20*l.*, and thereupon he brings his suit, &c.

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The defendants pleaded, first, non assumpsit; secondly, a traverse that the plaintiff was ready and willing to deliver the said cattle bones in manner and form, &c.; and thirdly, a traverse that they kept or detained the said vessel over and above and after the said four working days, in manner and form, &c. On all which pleas, issue was joined.

At the trial, which took place on the 4th of August, 1847, before the undersheriff of Kingston-upon-Hull, it appeared that the plaintiff was the captain and owner of a vessel called the *Courier*, that a certain cargo of cattle bones had been shipped on board his vessel by Messrs. Rosing and Company, at Bremen, for which he had signed bills of lading, in the following form:—"Shipped in good order, well conditioned, by Rosing and Company, in and upon the good schooner called the *Courier*, whereof is master for the present voyage, F. D. Stindt, and now riding at anchor in Elsfleth and bound for Hull, about one hundred and one tons of best dry cattle bones, being marked and numbered as in the margin and are to be delivered in

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the like good order and well conditioned at the aforesaid port of Hull, (the dangers and accidents of the seas excepted), unto order or to their assigns, paying freight for the said goods at the rate of 15*s.* 9*d.* per ton of 2240 lbs., gratuity 1*l.* 19*s.* 6*d.*, with per cent. primage and average accustomed. In witness whereof, the master or purser of the said schooner has affirmed to four bills of lading, all of this tenor and date, the one of which being accomplished, the others to stand void. Bremen, 10th of March, 1847. F. D. Stindt. Weight unknown. Vessel to be discharged in four working days or to be paid 2*l.* 10*s.* per day for laying days." That the vessel arrived in Hull upon the 18th of March, 1847, having made an average passage. That the vessel was reported at the Custom-house the same day as ready for delivery. That the defendants received the cargo as assignees of the bills of lading. That they did not finish unloading the vessel till the 26th of the same month. That one of the defendants, when told by the plaintiff's agent, that if they did not hasten the delivery, they would incur demurrage, said, "Never mind, we cannot help it if demurrage does take place." That the plaintiff's agent had afterwards called on the defendants with the account for freight and demurrage, when the defendants paid the freight but refused to pay the demurrage. In the course of the trial, the plaintiff's agents produced a book, called a manifest book, to shew the account delivered to the defendants, in which was the following entry:—

Manifest of the cargo of the Courier, J. D. Stindt, commander, from Bremen.

		tons	cwt.	qrs.	£	s.	d.
A quantity of cattle bones.	H. Roberts & Co.	98	18	2			
	at 15 <i>s.</i> 9 <i>d.</i> per ton	.	.	.	77	18	1
	Gratuity to the captain	.	.	.	1	19	6
					<hr/>		
					79	17	7
Three days' demurrage					.	7	10 0
					<hr/>		
					£87	7	7

It was not shewn that the defendants had ever seen the book or the entry, or that any notice had been given to them to produce the account delivered, and the evidence was objected to on their behalf; but the undersheriff ruled, that the book containing the account was admissible, conceiving it to be the original account between the parties, and that the one sent to the defendants was merely a copy; and also on the ground that it was in the nature of a public document. That at the close of the plaintiff's case, the defendants objected that he ought to be nonsuited, on the ground that there was no evidence to support the promise as laid in the declaration; but the undersheriff overruled the objection and left the case to the jury who returned a verdict for the plaintiff for the amount claimed.

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The present rule having been afterwards obtained,

H. Hill now shewed cause. The grounds upon which this rule was obtained, are it is understood, three in number. First, that the undersheriff ought not to have admitted the manifest book in evidence; secondly, that he ought to have directed the jury that there was no evidence to support the promise as laid in the declaration; and thirdly, that the declaration was bad in arrest of judgment, for not shewing any sufficient consideration for the promise. As to the first point, it must be admitted that the undersheriff was clearly wrong in conceiving the manifest book to contain the original account sent to the defendants, and therefore admissible in evidence without proof of notice to produce the original account delivered; but it is submitted that the evidence thus given was immaterial, and that there was abundantly sufficient evidence to warrant the verdict without such proof. The Court will not grant a new trial, on the ground that improper evidence has been received, where if it had been rejected, the verdict would still be warranted by the remaining evidence. The latest case on this subject is that of *Hughes v. Hughes (a)*. There the

✓(a) 15 M. & W. 701. See also *Boulton v. Pritchard*, ante, vol. 4, p. 117. ✓

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Judge had improperly rejected evidence, and Mr. Baron *Alderson*, in giving judgment says, "The granting a new trial, strictly speaking, is in the discretion of the Court, although the Court regulates its discretion as nearly as possible by the rules applicable to bills of exceptions. Where evidence has been improperly rejected or admitted, the Court will not grant a new trial, if with the evidence rejected, a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict." And for authority his Lordship refers to *Doe d. Lord Teynham v. Tyler* (a), and *Crease v. Barrett* (b). To these may be added *Horford v. Wilson* (c), and *Alexander v. Barker* (d). [Erle, J.—Probably there may be no objection to this evidence on another ground. It is a common practice at nisi prius to put an account for goods delivered into the hands of a witness, and ask him if he has examined it and can speak to the items having been delivered, and whether he has added it up, and the sum at the foot is correct. Here it may have been used merely to shew that three days' demurrage at 2*l.* 10*s.* per day amounted to 7*l.* 10*s.*, the sum claimed.] As to the second and third points, they are so much interwoven, that it will be more convenient to consider them together. The declaration states that certain cattle bones had been shipped for Hull by Rosing and Co., on board the plaintiff's vessel, upon certain terms contained in a bill of lading, one of which was that the vessel should be discharged within four working days, or 2*l.* 10*s.* per day to be paid for laying days; that they had duly arrived at Hull; that the bill of lading had been indorsed by Rosing and Co. to the defendants; and that thereupon, in consideration of the premises, and that the plaintiff at the request of the defendants would deliver and suffer the defendants to take the cattle bones, the defendants promised the plaintiff to accept and

✓ (a) 6 Bing. 564; S. C. 4 M. & ✓ (c) 1 Taunt. 12.

P. 377.

(d) 2 Cr. & J. 133.

✓ (b) 1 C., M. & R. 919.

take the same on the terms of the bill of lading and to discharge the vessel in four working days, or pay 2*l.* 10*s.* per day for laying days. It is then averred, that although the plaintiff performed all on his part to be performed, and was ready and willing to deliver, and did suffer and permit the defendants to take the said cattle bones; yet the defendants did not discharge the vessel within four working days, but kept and detained the vessel for the space of three laying days, whereby the plaintiff was put to great costs, and a large sum of money, to wit, 7*l.* 10*s.* became due and payable to the plaintiff according to the promise of the defendants in that behalf, as and for the detention of the vessel for the said three laying days; yet that the defendants have not paid the same. There was evidence of the facts set out in the declaration as the consideration of the promise, and therefore it is difficult to see in what way the undersheriff was wrong in leaving the case to the jury. The principle upon which parties taking goods as indorsees of a bill of lading, are held liable to the stipulations contained in the bill of lading, is laid down in the judgment of the Court in the case of *Scaife v. Tobin* (a). That was an action against a consignee taking goods under a bill of lading, for general average; and it was held that the action could not be sustained, as general average was not stipulated for in the bill of lading. There Lord *Tenterden*, C. J., says, "there can be no doubt that if a person receives goods in pursuance of a bill of lading, in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication engages to pay freight, and so he would to pay general average, if that were mentioned in the bill of lading." Mr. Justice *Littledale*, in the same case, says, "there is no doubt that a consignee, not the owner of goods, who receives them in pursuance of a bill of lading, in which it is expressed that they are to be delivered to him, he paying freight or demurrage, is liable to those charges; but then he is so liable by reason of a

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(a) 2 B. & Ad. 523, 528, 530.

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special contract implied by law from the fact of his having accepted goods which were to be delivered to him only on condition of his paying freight and demurrage." There are many cases to shew that an indorsee of a bill of lading, taking the goods, is liable for demurrage, if included in the bill of lading. The earliest is that of *Dobbin v. Thornton (a)*. There it was held, that if a person received goods from on board ship under a bill of lading, which are shipped to the shipper's order, or his assignees paying freight, with a certain allowance for demurrage, he makes himself, by acceptance of the goods, liable to all the terms of the bill of lading, and amongst the rest to demurrage. The case of *Jesson v. Solly (b)*, is identical with the present. There the consignee accepted goods under a bill of lading, at the bottom of which was a memorandum that the ship was to be cleared in sixteen days, and 8*l.* per day demurrage to be paid after that time; and it was held that the master, upon delivery of the goods, might recover demurrage against the consignee. Chief Justice *Mansfield* there says, "This is quite a new case, arising from the new state of trade, and there is great weight in the observation made for the plaintiff, that many of these ships coming from a foreign country, to which they may never go again, put into their bill of lading a condition, which enables them to look to the consignee for demurrage, as well as for freight. My Brothers are very clearly of opinion, that if the consignee will take the goods, he adopts the contract." *Heath, J.*, says, "It is clear the plaintiff is entitled to demurrage, either from the consignor or consignee. Demurrage is only an extended freight, and the consignee, by adopting this bill of lading, makes himself liable to demurrage as well as to freight." And *Chambre, J.* says, "It would be monstrous, if the consignee, accepting the contract with knowledge of the terms, should not be bound by it, and could send the captain back to the consignor for demurrage." To the same effect are the cases

✓ (a) 6 Esp. 16.

✓ (b) 4 Taunt. 52.

of *Harman v. Clarke and Others* (a), and *Harman v. Mant and Others* (b). In the late case, in the Exchequer Chamber, of *Sanders v. Vanzeller* (c), the liability of the assignee of the bill of lading to fulfil the terms contained therein, was fully discussed. That was an action of indebitatus assumpsit for freightage, primage, and demurrage against a consignee of a bill of lading, which referred to a charter party in the terms of which these items were included; and there were two points made in that case: first, that on the facts found by the jury, there was a promise implied by law from the defendant to the plaintiffs to pay the freight of the goods at the rate specified in the charter party; and, secondly, if there was not, that there was evidence of such a contract to go to the jury, and that the special verdict was defective, and therefore that there should be a venire de novo. The judgment of the Court of Exchequer Chamber, as delivered by *Tindal*, C. J., is material, as tending to correct, whilst laying down the law in this case, the somewhat loose use of the words, contract "implied by law," as applied to this class of cases. His Lordship there says, after briefly recapitulating the facts of the case as they appeared upon the special verdict, "The question referred by the jury to the Court is one of law: viz., whether the law would, upon these facts, imply a contract by the defendant with the plaintiff to pay the freight at the rate specified? We are satisfied that it would not, even if this were the case of an indorsee of a bill of lading which specified that the goods were to be delivered by the shipowner to the consignee or his assigns, he or they paying a certain specified sum for freight, without any reference to a charter party, and the indorsee had received the goods by virtue of that bill: there would have been no promise implied by law, though there would have been evidence to warrant the jury in finding that there was such a contract; and it has been so

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✓ (a) 4 Campb. 159.

✓ (c) 4 Q. B. 260, 294.

✓ (b) Ibid. p. 161.

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much the practice for the indorsee of such a bill of lading to pay the specified freight, if he accepts the goods under it, that there is little or no doubt that the jury would, on such a question, have found in favour of the shipowner if the indorsee received the goods without a disclaimer of his liability to the freight. But there is no authority for saying that, under such circumstances, there is a contract raised by law to pay the freight which another, viz., the consignor, has contracted with the shipowner to pay. Upon principle, it cannot be contended that the contract runs with the property in the goods and is transferred with it; and there is no decision to that effect." "We are also of opinion that, if the jury had found such contract, it would not support this declaration, which ought to have been a count in special assumpsit, or at least indebitatus assumpsit for the freight for goods delivered to the defendant at his request. If the law had been that there was an implied contract, on the ground that the obligation to pay freight was transferred with the goods to the indorsee, so that he would have been indebted for the freight, this declaration would have been proper; but that is not the law." Upon the principle, therefore, of these cases, it is submitted that even an action of indebitatus assumpsit would have lain, in the present case, for demurrage on the goods delivered to the defendant at his request, much more the present action, in which all the special facts are set out. After verdict, the contract of the defendant must be taken to have been an express one. If the contract as set out in the declaration be good, then the facts in evidence at the trial sufficiently prove it. Then with respect to the motion in arrest of judgment, this is not the case of an entirely past consideration. Part of it is executory, namely, that the plaintiff would deliver, and suffer the defendants to take, the cattle bones. A sufficient consideration is therefore shewn on the face of the declaration.

Willes, in support of the rule. The manifest book, it

has been conceded, was no evidence of the contents of the accounts sent to the defendants; but it is said, the Court will not grant a new trial, when they see that if the evidence improperly received had been rejected, there was sufficient evidence remaining to warrant the verdict. But that would only be where the evidence improperly received could not have weighed with the jury in giving their verdict. The Court, in this instance, cannot tell what weight the jury may have attached to the entry in the plaintiff's agents' book in the regular course of business. In *De Rutzen v. Farr* (a) it was held, that where improper evidence was received, and a verdict given for the party adducing it, the Court would grant a new trial, although there was other evidence to the same point in favour of the same party; unless they could clearly see that the improper evidence could not have weighed with the jury, or that the verdict if given the other way, would have been set aside as against evidence. [*Erle, J.*—All that is proved by the manifest book is abundantly proved aliundè.] The Court cannot say that the jury did not act on the sight of this book without adverting to or considering the other evidence. A jury always lays great stress upon a written document. It has been suggested that it may have been properly admitted to shew what the addition of the items of the plaintiff's claim was. It is not intended to dispute the propriety of a practice so commonly pursued at nisi prius; but it is submitted, that such a course should only be allowed where the items are numerous and the addition a work of time, and where, therefore, for the dispatch of business, such a proceeding may become necessary. With respect to the second point, the declaration is in special assumpsit, stating a promise to pay demurrage. The declaration must, therefore, be supported, either by proof of an express promise (of which there was none), or by such facts as evidence an implied

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✓(a) 4 A. & E. 53; S. C. 5 N. & M. 617.

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one. Now, it is submitted, there were in this case no such facts proved. The indorsee of a bill of lading, taking goods, brought from a foreign country, under a bill of lading, which provides that the party taking them shall pay freight, it is admitted, renders himself liable for the freight; but is not liable to the terms of a special contract like that for demurrage, which may, or may not, ever become payable. He is only liable to freight on taking the goods under the bill of lading, on the ground that that fact is evidence of a new contract between him and the owner of the vessel; *Cock v. Taylor* (a); *Sanders v. Vanzeller* (b); and it cannot be disputed for a moment that he is not liable even for freight, merely as indorsee of the bill of lading, except on delivery and acceptance of the goods (c). The mere receipt of the goods under the bill of lading is not of itself sufficient to bind the party receiving them to the terms of the bill of lading, even in respect of freight; *Amos v. Temperley* (d). Here the promise, as stated in the declaration, is before the delivery, and consequent on the plaintiff's promise to deliver. What evidence was there of such a promise? If such a promise as the present could be sustained, the plaintiff might have declared averring instead of actual delivery, a tender of delivery, and the plaintiff would equally be entitled to succeed. [*Erle, J.*—Where indebitatus assumpsit for freight would lie against the indorsee of the bill of lading, would not an action lie on a promise by the indorsee that in consideration of the delivery he would pay freight?] That may be so. [*Erle, J.*—Then, in point of fact, there may exist a contract before delivery.]

As to the last point, it is submitted, that there is no sufficient consideration stated for the promise alleged in the declaration. The consideration stated might support a promise to pay freight, but not a promise to pay demur-

✓ (a) 13 East, 399.

14 M. & W. 403.

✓ (b) 4 Q. B. 260.

✓ (d) 8 M. & W. 798.

✓ (c) See *Thompson v. Dominy*,

rage. He referred to *Roscorla v. Thomas* (a), and *Jackson v. Cobbin* (b).

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Cur. adv. vult.

ERLE, J.—In this case a rule for a new trial had been moved for, and it was objected,—first, that the admission of the book of the plaintiff in evidence for himself on the grounds that it was a manifest, and in the nature of a public document, was wrong.

But although the book was not admissible to prove any fact, still I am of opinion, looking to the nature of the entry, that its reception is no ground for a new trial. It was a mere statement of the items of the plaintiff's claim, viz., that the freight for 98 tons and a fraction, at 15s. 9d. per ton, amounted to 77*l.* 18s., and so forth.

The facts on which those claims were rested were proved by legal evidence, and the book only added the results of multiplication and addition. A copy of the entry would have been analogous to the ordinary bill of the particulars of a plaintiff's demand, which, after proof of the items, is often referred to by the jury for separate amounts and the sum total.

It was also objected, that there was no evidence of the alleged promise to discharge the vessel in four days; but the claim of the cargo by the defendants as the assignees of the bill of lading, was evidence of an agreement to the terms therein mentioned in consideration of which the master agreed to deliver the cargo.

The principle on which the consignee is taken, to contract for the freight and demurrage mentioned in the bill of lading, applies in respect of other stipulations therein mentioned, and the promise to pay demurrage in case of detention is, in effect, a promise to discharge within the limited time, or pay for the detention.

(a) 3 Q. B. 234; S. C. 2 G. & D. 508.

(b) 8 M. & W. 790; S. C. 1 Dowl. 96, N. S.

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It was objected, in arrest of judgment, that the consideration, although valid for a part of the promise, was invalid as to the part relating to discharging the vessel in four days.

But no principle or authority was adduced to shew that a consideration, valid according to the general definition, can be insufficient in law to support any promise which the contracting party may, in fact, choose to make thereon. That objection also appears to me to fail, and therefore the rule must be discharged.

Rule discharged.

COURT OF COMMON PLEAS.

Hilary Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

In the matter of HANNAH JANE PAGE.

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CHANNELL, Serjt., applied to the Court for a direction to the Master to receive the affidavit of the acknowledgment made by a married woman under the 3 & 4 Wm. 4, c. 74, in India. The commission for taking the acknowledgment had been directed to five gentlemen. Among them were Robert Moseley, and Thomas and Robert Townsend Allen, and they took the acknowledgment at Calcutta. Their certificate was in the proper form. There was also an affidavit of the due taking of the acknowledgment made by R. T. Allen and W. G. Champion, who was a third commissioner, but who had not taken the acknowledgment, and both were solicitors of the Supreme Court of Calcutta. The Master objected to receive this affidavit, on the ground that the jurat was defective. The form of it was "Sworn at the Police Office, Calcutta, this 4th day of October, 1847, before me, J. W. Birch, one of her Majesty's justices of the peace for the town of Calcutta."

The rule as to the exclusion of affidavits in the jurats of which there are interlineations, applies to affidavits sworn in India.

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After the word "Calcutta" in the prior part of the jurat was a caret, and immediately above the caret were the words "by each of the above deponents," naming them, interlined: and in the margin of the jurat were the initials "J. W. B." The question was, whether the rule Michaelmas Term, 37 Geo. 3 (*a*), excluding affidavits in the jurats of which there were interlineations, applied to affidavits made in India, where there was so much difficulty in procuring affidavits.

WILDE, C. J.—According to the rule of the superior Courts, there is to be no interlineation in the jurats of affidavits. In the present case, there was a want of identity without the interlineations here made. If, therefore, the rule applied to such cases, there is no doubt that this affidavit could not be used. Now there is less probability of a mistake in affidavits sworn here than in affidavits sworn abroad. It is difficult to make distinctions where there is a regular tribunal, although the Court might be led to think that there was not much chance of inaccuracy. But the affidavit might come from a place where less accuracy could be expected. In the present case, we see no reason for departing from the general rule, and we think it better to abide by it.

PER CURIAM.

Order refused.

(a) 2 Archb. Pract. 1454, 8th ed.

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BATTY v. MARRIOTT.

HUGH HILL moved to revive a rule, which had expired, under these circumstances. A rule in this cause had originally been obtained in Trinity Term, 1847, and had been enlarged to Michaelmas Term following. It was then, according to the practice of the Court, put into the peremptory paper; and at the latter end of that Term, was enlarged by consent to the present Hilary Term. The enlarged rule was not, however, served on the opposite party. When the rule came on for discussion, no one appeared to shew cause, and it was made absolute accordingly. It was, however, ascertained that, by the practice of the Common Pleas, as differing from the practice of the other Courts, it was necessary to serve enlarged rules although enlarged by consent. The object of the present application was to revive the rule in order to serve it, for the opposite party relying on the peculiar practice of this Court, might not have appeared in consequence of not being served. The party, whose duty it appeared to be, to serve the rule was not to blame, as it was laid down in 2 *Chit. Archb. Pract.*, p. 1420, 8th edit., that "it is not the practice to serve an enlarged rule, because both parties are before the Court." For this statement, an anonymous case in 1 *Smith's Rep.* p. 199, was cited.

Where a rule is enlarged by consent, it is in the C. P., notwithstanding such consent, the practice to serve the enlarged rule.

1 C. S. C. P. 1420.

PER CURIAM.—It appears by the report of the Master, that the practice is for the party desirous of keeping the rule alive, to serve an enlarged rule, even though it has been enlarged by consent. Under the circumstances, however, the rule may be revived.

Rule revived.

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1 C. & F. 483.

WEBB v. INWARDS.

In an action on a banker's cheque, the venue cannot be changed on the common affidavit.

BYLES, Serjt., shewed cause against a rule nisi, obtained by *Talfourd*, Serjt., for discharging a rule to change the venue granted on the common affidavit. The venue was originally laid in Bedfordshire, and the common affidavit being made, the venue was on the 4th of January changed from Bedfordshire to London. The present rule was then obtained to bring it back to Bedfordshire. It was an action of assumpsit, and the declaration contained a count on a banker's cheque, drawn on S. and Co., bankers at Bedford; another for goods sold and delivered, and a third on an account stated. The defendant traversed the making of the cheque; pleaded non assumpsit to the other counts, and also accord and satisfaction by two bills of exchange. On these pleas, issues were joined. The question was, whether the action being brought on a cheque as well as for goods sold and delivered, the defendant was in a situation to change the venue on the common affidavit. The case might first be considered, as if the count on the cheque was the only one in the declaration. No doubt, the rule formerly was, that where an action was founded on a written instrument of any sort, the venue could not be changed on the common affidavit. But since the decision in the case of *Mondel v. Steele* (a), a different practice had prevailed. There, the Court of Exchequer reviewed the cases, and the rule was stated by *Parke*, B. thus, "In this state of the authorities, we think that it cannot be laid down as a general proposition, that the venue is not to be changed in actions on written instruments, appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to a general rule, which, in conformity with the statute law, is, that actions should be tried, where

✓ (a) 1 Dowl. 155, N. S.; S. C. 8 M. & W. 640.

the causes of action arise; and the exceptions to that rule should not be readily extended. We think, that in all actions on contracts, although in writing, except on specialties, bills, and notes, the venue may be changed upon the usual affidavit being made." In *Roberts v. Wright* (a), the Court of Exchequer permitted the venue to be changed on the common affidavit in an action on an I O U, and in *Slade v. Trew* (b), the Court permitted the venue to be changed on the common affidavit, in an action on an agreement containing very complicated terms. There, Lord *Lyndhurst*, said, "there are numerous instances in which the venue has been changed in actions upon written contracts." The question then was, whether a cheque could be considered as an instrument to which the observations of Lord *Lyndhurst* and *Parke*, B. applied. It might possibly be contended that it was in the nature of an inland bill of exchange, but in popular language, it certainly was not, and it did not require a stamp. But supposing that it could properly be treated as an inland bill of exchange, and therefore forming an exception to the general rule requiring actions to be tried where the cause of action arose; then as the declaration here contained counts for goods sold and delivered and on an account stated, the case was distinguishable from those which might be cited in support of the present application. [*Wilde*, C. J.—A cheque is a bill of exchange. It has all the incidents of a bill of exchange, and but for the exception in the Stamp Act, it would require a stamp. *Maule*, J.—It is, in fact, a bill of exchange; and whatever reasons exist for not permitting the venue to be changed in an action on a bill of exchange, equally apply to an action on a cheque.]

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Talfourd, Serjt., contrà, was stopped by the Court.

(a) 1 Dowl. 294; S. C. 1 C. & J. 547.

(b) 1 C. & M. 584; S. C. 2 Dowl. 65.

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WILDE, C. J.—The rule for changing the venue in this case was obtained on the common affidavit in a case to which such an affidavit would not properly apply. The rule has, therefore, been irregularly obtained, and this rule must be made absolute to discharge it.

MAULE, J., and CRESSWELL, J., concurred.

WILLIAMS, J., referred to the case of *Martin v. Daves* (a), where the Court of Exchequer were of opinion that in an action on an award, the venue could not be changed on the common affidavit.

Rule absolute.

✓ (a) *Ante*, vol. 1, p. 279.

HAYWARD v. BENNETT.

Debt on a bond given by a surety under the 1 & 2 Vict. c. 110, s. 8. Plea, that after making the bond, the plaintiff brought an action against the principal, and took and detained him in execution, according to the practice of the Court of Queen's Bench, in respect of the said debt; that, from the time of recovering such judgment

until the arrest, he, the principal, was always ready and willing to render himself, according to the course and practice of the Court of Queen's Bench; and that by reason of his detention in execution, he was, by the practice of the said Court, exonerated and discharged from rendering himself according to the said condition: *Held*, on special demurrer, that the plea was bad, as it did not distinctly allege either that the principal did surrender according to the condition of the bond, or that such surrender was made impossible by the act of the plaintiff.

DEBT. The declaration was on a bond given by the defendant as a co-surety for a person named Hales, under the 1 & 2 Vict. c. 110, s. 8, in the sum of 1363*l.* 10*s.* 3*d.* The bond was in the usual form, and the condition set out upon oyer was, "that if Hales should pay the sum to be recovered or render himself to the custody of the gaoler of the Court in which such action shall have been brought or may be brought for the recovery of the said alleged debt, according to the practice of such Court, or within such time and in such manner as the said Court or any Judge thereof shall direct, after judgment shall have been recovered in such action, then the said obligation to be void; but otherwise the same to stand and remain in full force and effect."

The defendant pleaded, that after the making of the said writing obligatory, and before the commencement of this suit, &c., the plaintiff brought and commenced an action against J. Haffer and H. Hales in the Court of Queen's Bench, for the recovery of the said alleged debt; and afterwards the plaintiff recovered in the said action 924*l.* 1*s.* for debt and costs; that afterwards, and before the commencement of this suit, and "according to the practice of the said Court," to wit, on the 29th day of October, 1842, the plaintiff caused to be sued out a *ca. sa.* against Hales, directed to the sheriffs of London, and returnable on the 15th of November, &c.; that afterwards, and according to the practice of the said Court, to wit, on the 29th of October, 1842, the said writ was delivered by the plaintiff to the said sheriffs, &c.; and that the said Hales, before the time for rendering himself, "according to the practice of the said Court and the said condition, to wit, on the 14th of November, 1842," was, according to the practice of the said Court, taken and arrested by the said sheriffs, under the said writ, and was then kept and detained in execution, in custody, under and by virtue of the said writ, at the suit of the said plaintiff, upon the said judgment so recovered as aforesaid, and according to the practice of the said Court, which practice then and before, and at the time of the making of the said writing obligatory, existed until and after the return day of the said writ of *ca. sa.*, for a long space of time thereafter, to wit, hitherto; of all which premises the plaintiff afterwards, &c., had notice; and that from the time of the recovery of the said judgment until the said Hales was so taken and arrested under the said writ of *ca. sa.* as aforesaid, the said Hales was always ready and willing to render himself to the custody of the gaoler of the said Court, according to the practice of the said Court and the said condition of the said writing obligatory; and that by reason of the said Hales having been so taken and arrested, and kept and detained in execution as aforesaid, and of the premises aforesaid, the said Hales was, "by the practice of the said

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Court, exonerated and discharged from rendering himself to the gaoler of the said Court, according to the said condition;" and that the defendant and the said T. Cope, by reason, &c., were, as such sureties as aforesaid, "by the said practice of the said Court, exonerated and discharged from rendering the said Hales to the gaoler of the said Court, according to the said condition," &c. Verification.

To this plea, the plaintiff demurred on various grounds; and, among others, that the plea was ambiguous, and did not shew a performance of the condition, or an excuse for the non-performance of it.

The case had already been before the Court (*a*) on a demurrer to a plea similar to the present, which alleged that Hales was willing to surrender, "but that he was prevented from so doing in manner aforesaid." This plea the Court held bad, for not expressly alleging that the principal Hales had surrendered according to the practice of the Court, or that the act of the plaintiff in taking him in execution rendered it impossible for the defendant to render him, as the Court could not take judicial notice, that issuing such a writ was an impediment to the render. Leave was, however, given to amend, and the plea above set out was pleaded.

Butt (with him *Parnell*) appeared to support the demurrer. The plea now before the Court was equally objectionable with the one which had already been held insufficient. The defendant, in order to make his plea good, must either shew that he had fulfilled the condition of the bond, or that the fulfilment of it was rendered impossible by the act of the obligee. It was not competent for the defendant to avail himself of the practice of the Court in which it was alleged the action had been brought, for the purpose of altering the condition of the bond. First, the plea here did not allege that the principal had, according to the practice of the Court, rendered; and if it was intended to

/ (*a*) *Ante*, vol. 4, p. 228; S. C. 3 C. B. 404. ✓

make it appear that what had been done, did in point of practice amount to a render, then the plea should have set out that practice. Secondly, the plea did not shew any excuse for not rendering the principal. It merely stated that the defendant was exonerated and discharged by the practice of the Court of Queen's Bench from rendering him. The Court could not take judicial notice of the practice existing in another Court, so as to see that the defendant was excused from the performance of the condition. The plaintiff could not, as the plea now stood, safely traverse any of the material allegations contained in it.

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Talfourd, Serjt., (with him *Ogle*), supported the plea. The objections to the former plea did not exist to the amended one now before the Court. The former plea did not shew that the act of the plaintiff rendered it impossible to perform the condition. But here the plea alleged that the plaintiff, by suing out his execution and taking the defendant, did, by the practice of the Court in which he brought his action, exonerate the plaintiff from rendering his principal. [*Maule*, J.—That argument is used for the purpose of bringing this case within the rule laid down in *Co. Litt.* 206, a, that “in all cases where a condition of a bond, recognizance, &c., is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation, &c. is saved.” But to bring the case within that principle, it ought to be shewn by the plea that the act of the plaintiff made it “impossible” to render the principal. But the plea says, that the practice of the Court of Queen's Bench excused the render. If it did, then as we cannot take judicial notice of what that practice is, ought not the defendant to shew on his plea what that practice is?] The plea states that the principal was taken into custody, the effect of which the Court must see would be to make it impossible to render him. [*Maule*, J.—The former decision

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in this case is contrary to that view. *Williams, J.*—If the plea had set out the fact, and then concluded “per quod, it became impossible for the defendant to render Hales;” if the “per quod” is an inference of law, it cannot be traversed, and the plea might be good; but the Court held that the “per quod” was a conclusion of fact, and, therefore, traversable.] It was held in *Pryce v. Belcher (a)*, that the words in a pleading after the “per quod” amounted to an averment of a matter of fact, and were not mere matter of legal inference from the preceding allegations. [*Maule, J.*—No doubt matter of fact is not the less traversable because it is stated after a “per quod.” But an allegation that “it thereby became his duty,” would be an allegation of law. Perhaps the proper way would be to ascertain what the practice of the Court of Queen’s Bench is upon this point; and if the taking the principal in execution amounts to a render, or makes a render impossible, then plead it accordingly.]

PER CURIAM.

Leave to amend on the usual terms, otherwise judgment for the Plaintiff.

(a) *Ante*, vol. 4, p. 338; 8 C. 3 C. B. 58.

DOE dem. HARRISON v. HAMPSON (a).

The under-taking of the lessor of the plaintiff, in the common consent rule, to pay costs, is only personal, and cannot be enforced at the instance of the defendant’s administrator.

BUTT shewed cause against a rule nisi, obtained by *Montagu Smith* at the instance of the defendant’s administrator, calling upon the lessor of the plaintiff to shew cause

(a) This case was decided in Trinity Term, 1847; but was accidentally omitted in its proper place.

Semble, that where a rule has the force of a judgment under the 1 & 2 Vict. c. 110, s. 18, it is not necessary that a rule should be served calling on the party in default to shew cause why he should not pay the amount mentioned in the rule (b).

(b) See *Doe d. Pennington v. Barrell, ante*, vol. 4, p. 755.

why he should not pay the costs of the trial had in this cause, in which a verdict had been found for the defendant. It was an action of ejectment, and had been tried at the Spring Assizes for the county of Somerset, in the year 1846. The defendant died intestate on the 25th of November, 1846. Administration was, in the following month of March, granted to the defendant's son, Crispin Hampson. On the 23rd of March, 1847, an order was made by *Erle, J.*, to enter judgment nunc pro tunc, as of the 21st of April, 1846; and also, that the defendant's costs should be taxed by the Master. In pursuance of that order, judgment was signed, and the Master taxed the defendant's costs at 68*l.* 12*s.*, upon the consent rule. The authorities clearly shewed that the liability to pay costs under the consent rule depending on the undertakings therein given was clearly personal, and only capable, in case of non-payment, of becoming the foundation of an attachment. The case of *Goodright v. Holton* (a), must be considered now as overruled. He cited *Thrustout v. Bedwell* (b); *Adams on Ejectment*, p. 280, 4th ed.; 2 *Wms. Saund.* 72, note (n); 2 *Wms. on Exors.* 1575, 3rd ed.; *Hullock on Costs*, 647, 2nd ed.; *Tidd's Pract.* 1243, 9th ed.; *Doe d. Pais v. Grundy* (c); *Newton v. Walker* (d). The lessor of the plaintiff not being liable to these costs independent of the 1 & 2 Vict. c. 110, s. 18, that act would not alter his liability, as it merely provided a more convenient remedy instead of attachment. If the defendant were still living, he could not have proceeded under the 1 & 2 Vict. c. 110, s. 18; *Jones v. Williams* (e); *Neale v. Postlethwaite* (f); *Hodson v. Patterson* (g); *Doe v. Ballard* (h). In such a case, the mode would be to proceed by scire facias to revive the judgment in favour of the personal representative.

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✓(a) Barnes, 119.

& D. 623.

✓(b) 2 Wils. 7.

(g) 4 M. & G. 333; S. C. 5

✓(c) 1 B. & C. 284; S. C. 2 D. & R. 437.

Scott, N. R. 76; 2 Dowl. 129, N. S.

(d) Willes, 315.

(h) Cited from 9 Law Times,

✓(e) 8 M. & W. 349; S. C. 9 Dowl. 702.

124. Since reported, *nom. Doe d. Pennington v. Barrell*, ante,

✓(f) 1 Q. B. 243; S. C. 4 P.

vol. 4, p. 755.

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Montagu Smith supported the rule. If there were any difficulty in the case, it arose from the judgment having been entered nunc pro tunc. That, however, could constitute no ground for discharging the present rule. The decision in *Thrustout v. Bedwell* (a), could not be regarded as any authority on the subject, as the opinion there expressed was merely obiter; while the decision in *Goodright v. Holton* (b) was directly in point, as there a similar application to the present was granted. The object of the statute of 1 & 2 Vict. c. 110, s. 18, was to give greater facilities to creditors in securing the payment of their debts, and therefore a fi. fa. might be issued at the suit of the administrator of the deceased defendant.

Cur. adv. vult.

WILDE, C. J.—This was a rule obtained on behalf of the administrator of the defendant, calling upon the lessor of the plaintiff to shew cause why he should not pay the costs taxed upon the consent rule, a verdict having been found against him at the trial. It appears that the defendant died on the 26th of November, 1846, and that judgment was entered as of Easter Term, 1846. It has repeatedly been held, that the liability to pay costs under the consent rule in ejectment is merely personal to be enforced by attachment only, and that it dies with the party. It was so held in *Thrustout v. Bedwell*; and *Doe dem. Pain v. Grundy* (c); and the rule is so stated in several of the text books to which reference has been made. The only authority opposed to these is the case in *Barnes*, of *Goodright v. Holton*. We have caused search to be made, and we find that that case is not quite as stated in the report. The rule was not made upon the ordinary consent rule.

This motion is founded upon the 18th section of the 1 & 2 Vict. c. 110, which enacts, "that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of

✓(a) 2 Wils. 7.

✓(b) *Barnes*, 119.

✓(c) 1 B. & C. 284; S. C. 2 D. & R. 437.

Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior Courts of Common Law with respect to matters depending in the same Courts shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.^a The object of that clause is not to give to the Courts any greater powers than they before possessed, or to make parties liable for costs for which they were not liable before; but merely to give to such rules and orders the effect of judgments. I cannot discover that it authorizes the Court to make the rule here prayed. The consent rule expressly requires the lessor of the plaintiff to pay the costs, in the event of a verdict being found for the defendant. Here the defendant has obtained a verdict and judgment, and the costs have been adjudged to him. Assuming that the consent rule has the force of a judgment, then, according to the cases of *Jones v. Williams* (a); *Doe v. Amey* (b); *Neale v. Postlethwaite* (c), and *Hodson v. Patterson* (d), the motion is unnecessary (e): and if it has not the force of a judgment, we are equally without power to do that which is prayed.

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Rule discharged.

✓(a) 8 M. & W. 349.

(b) Ibid. 565.

✓(c) 1 Q. B. 243.

✓(d) 4 M. & G. 333.

✓(e) See *Doe d. Pennington v. Barrell*, *ante*, vol. 4, p. 755. [Note by reporters.]

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The Court permitted an affidavit of verification of an acknowledgment by a married woman to bar her dower before commissioners, to be received by the officer of the Court; although written on paper, instead of parchment.

Ex parte CARR.

BALL, applied for a direction to the Master to receive an affidavit of verification of an acknowledgment by a married woman, before commissioners at Toronto, for the purpose of barring her dower, in pursuance of the 3 & 4 Wm. 4, c. 74, s. 85. The affidavit was written on paper, and was perfectly regular in point of form. The officer, however, hesitated to receive the affidavit, on the ground that it ought to be on parchment, it being the practice to require such an affidavit to be on parchment, by analogy to the practice established under the rule of Hilary Term, 14 Geo. 3, in the case of affidavits verifying acknowledgment of fines and warrants of attorney to suffer recoveries. Such a practice was not required by the words of the statute itself, as that merely spoke of an affidavit, without mentioning the material on which it was to be written. The reason for the practice established in the case of fines and recoveries, did not apply to an acknowledgment by a married woman to bar her dower. Fines and recoveries were conveyances by record, by which a base fee or a fee simple passed; but by the married woman's acknowledgment, only an estate for life passed; it was reasonable that the affidavit in the former case should be on parchment, as it was a quasi record, but the latter could not be viewed in the same light. If the practice now adopted was to be enforced in the present case, it would be requisite to send out to Toronto to procure an affidavit made on parchment.

PER CUNHAM.—The object of the affidavit is to satisfy the Court of the authenticity of the certificate; but as in the present instance, the object of the acknowledgment is only to bar dower, and not to pass the fee, we do not think that it is indispensable, that the affidavit of verification should

be on parchment. The officer may, therefore, receive the affidavit and file it.

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Order granted. (a)

- (a) By the 5 & 6 Vict. c. 106, a 7. married women were permitted, after the first day of October, 1845, to *disclaim* by deed any estate or interest in any tenements or hereditaments in England; that deed, however, to be in conformity with the provisions of the 3 & 4 Wm. 4, c. 74, with respect to the disposing of her interest in real property to which she was entitled.

ELDERTON v. EMMENS, the Secretary for the time being of the CHURCH OF ENGLAND LIFE AND FIRE ASSURANCE TRUST AND ANNUITY COMPANY.

BYLES, Serjt., and *Hugh Hill* shewed cause against a rule obtained by *Talfourd*, Serjt., for reviewing the Master's taxation, on the ground of an improper allowance and disallowance of costs. It was an action of assumpsit, and the declaration contained four counts; the first and second, were in special contracts; the third, for work and labour; and the fourth, on an account stated. The defendant pleaded to the whole declaration, non assumpsit; to the first and second counts respectively, a justification; to the third and fourth counts, payment. The verdict was entered in favour of the defendant on the first plea, except as to the second count; and for the plaintiff as to that count, and on the pleas of justification and payment. Judgment was afterwards arrested on the second count. When the parties appeared before the Master for the purpose of taxation, he allowed the defendant the general costs of the cause, and disallowed the plaintiff the costs of his witnesses on the plea of justification to the first count, because they

A declaration in assumpsit contained two special counts, a count for work and labour, and a count upon an account stated. Pleas, first, as to the whole, non assumpsit; second, a plea of justification to the first count; third, a plea of justification to the second count; fourth, to the fourth count, payment. Verdict on the plea of non assumpsit, for so much as related to the first, third, and fourth counts for the defendant, and upon the

special pleas and non assumpsit to the second count for the plaintiff. Judgment was afterwards arrested on the second count. *Held*, that the Master was right in allowing the defendant the general costs of the cause; and in disallowing the plaintiff the costs of witnesses called by him in support of the issue on which he was successful, but which witnesses were not exclusively applicable to it.

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were not exclusively applicable to that issue; but were also applicable to the issues on which the defendant had succeeded. He allowed two copies of the deed of settlement. The objections were, that the Master should have disallowed the defendant the general costs of the cause, as well as the two copies of the deed of settlement; and should have allowed the plaintiff the costs of his witnesses on the issue on which he had succeeded. It was submitted that the Master had, in allowing the defendant the general costs of the cause, acted on the universal practice of all the Courts. No doubt the case of *James v. Brook (a)*, was an authority directly in support of the present rule. The effect of that decision was, that when the defendant did not succeed on the whole record, he was not entitled to his costs. That was a decision of Mr. Justice *Erle*, sitting alone in the Bail Court. The case had passed without much discussion, and the authorities on the subject had not been cited. The determination of the question must, however, depend on the language of the 23 Hen. 8, c. 16, s. 1, which was the first statute giving defendants their costs; the statute of Gloucester, 6 Edw. 1, c. 1, only applying to plaintiffs. The words of the statute of Henry 8, were, that; "in trespass upon the statute of King Richard the Second, made in the fifth year of his reign, for entries into lands and tenements, where no entry is given by the law, or any action, bill, or plaint of debt or covenant, upon any specialty made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff or plaintiffs, and any other person or persons, or any action, bill, or plaint of detinue of any goods or chattels, whereof the plaintiff or plaintiffs shall suppose the property belongeth to them, or to any of them, or any action, bill, or plaint of account, in the which the plaintiff or plaintiffs suppose the defendant or defendants to be their bailiff or bailiffs, receiver or receivers of their manor, mese, money, or goods, to yield account, or any action, bill, or plaint upon the case, or upon any statute, for any offence or

/(a) *Ante*, vol. 4, p. 577.

wrong personal immediately supposed to be done to the plaintiff or plaintiffs, and the plaintiff or plaintiffs in any such kind of action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass, by lawful trial, against the plaintiff or plaintiffs in any such action, bill, or plaint, that then the defendant or defendants in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff or plaintiffs; and that to be assessed and taxed by the discretion of the Judge or Judges of the Court where any such action, bill, or plaint shall be commenced, sued or taken; and also that every defendant in such action, bill, or plaint, shall have such process and execution for the recovery and having of his costs against the plaintiff or plaintiffs, as the same plaintiff or plaintiffs should or might have had against the defendant or defendants, in case that judgment had been given for the part of the said plaintiff or plaintiffs in any such action, bill, or plaint." Now the authorities clearly shewed that where the defendant succeeded on an issue, which went to the whole cause of action, he was entitled to the general costs of the cause, although the plaintiff would be entitled to the costs of the issues on which the defendant had failed. The cases of *Hart v. Catbush* (a); and *Frankum v. Lord Falmouth* (b), were authorities to this effect, which was in perfect conformity with the earlier case of *Day v. Hanks* (c). There, the declaration contained two distinct causes of action in two counts respectively, and the defendant suffered judgment by default as to one, and took issue on the other. On that issue he obtained a verdict, and the Court held that he was entitled to his costs on the latter count, notwithstanding the plaintiff was entitled to costs on the first count. To the same effect were *Thornton v. Williamson* (d); *Cross v. Johnson* (e); 1 *Wms. Saund.* 800 b, n. (l), 6th ed.; *Goodburne v. Bowman* (f). The marginal note

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✓(a) 2 Dowl. 456.

✓(b) 4 Dowl. 65.

✓(c) 3 T. R. 654.

(d) 13 East, 191.

✓(e) 9 B. & C. 613; S. C. 4 M. & R. 290.

✓(f) 9 Bing. 667; S. C. 3 M. & Scott, 69; 2 Dowl. 206.

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of the last case was, that "where immaterial issues are found in favour of defendant, and judgment is afterwards entered for plaintiff non obstante veredicto, neither party is entitled to the costs of the immaterial issues." There, *Tindal*, C. J., said, "the issues in question were found for the defendant, and in no sense of the word can the plaintiff be said to have succeeded on them. If the verdict were for him on a bad count, he would not be entitled to costs; still less can he be so entitled, where, upon an immaterial issue, the verdict is against him. By obtaining judgment non obstante veredicto, he has not succeeded, on such issue; he has only put it out of the way. Now, with respect to the defendant. In order to entitle him to costs, the issues found for him must be such as he can ultimately succeed on; real issues in point of law, on which judgment can be signed." These cases shewed that where a party cannot recover on one part of his declaration, that is to be considered as put out of the way, and then the defendant became entitled to the general costs of the cause, because the issues on which the defendant had succeeded, were the only ones to be taken into consideration. [*Wilde*, C. J.—You contend that but for the introduction of the second count, the defendant would have been entitled to the general costs of the cause; and that the plaintiff is not to be in a better situation from having introduced a bad count into his declaration.] Precisely so. Then, as to the allowance of the witnesses, the Master was quite correct in not allowing to the plaintiff the costs of those witnesses whose evidence did not exclusively apply to the issues on which he had succeeded. Thus it was held in *Knight v. Woore* (a), where an action of trespass was brought, and the defendant pleaded a justification under a right of way to carry water and goods: as to the water, the jury found a verdict for the defendant: and as to the goods, for the plaintiff. It was held, that the defendant had substantially succeeded, and was, therefore, entitled to the general costs of the cause; and that he was also entitled to the costs of a witness who spoke as to the

✓ (a) 3 Bing. N. C. 534; S. C. 4 Scott, 360; 5 Dowl. 487. —

water, notwithstanding he spoke also as to the goods. With regard to the number of copies of the deed of settlement, which had been allowed on taxation, that was a matter of detail purely in the discretion of the Master; and with the exercise of that discretion, the Court would not interfere.

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Talfourd, Serjt., in support of the rule. The question depended on the construction of the statute of the 23 Hen. 8, c. 15, s. 1. The language of that section was clearly intended to embrace only those cases in which the verdict passed in favour of the defendant on the entire record. Here however, the defendant was not entitled to a verdict on the whole record, and therefore, could have no right to the general costs of the cause, although by the new rules (Reg. Gen., Hil. Term, 2 Wm. 4, r. 74), he would be entitled to the costs of the issues found in his favour. The case of *James v. Brook* (a) was not distinguishable from the present; and there Mr. Justice *Erle* had, after time taken to consider, pronounced in favour of the view now presented. The Court must, therefore, be prepared to overrule that case, or to make the present rule absolute. The second count, the Court had held to be a bad one, and accordingly arrested the plaintiff's judgment. To that count, however, the defendant might have demurred; and by not doing so, he had caused the expenses attendant on trying the issue to that plea. It was, therefore, but just that he should pay the costs of such unnecessary trial. With respect to the allowance made by the Master of two copies of the deed of settlement, that was clearly excessive, as either extracts of the deed might have been made, or a less number of copies allowed.

Cur. adv. vult.

WILDE, C. J.—The plaintiff declared against the de-

✓ (a) *Ante*, vol. 4, p. 577.

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defendant as secretary of the Church of England Life and Fire Assurance Trust and Annuity Company, in two counts, on two different contracts to employ him as attorney and solicitor to the company. There were also counts for work and labour, and on an account stated.

The defendant pleaded to the whole declaration, that the company did not promise; and a special plea to the first and second counts respectively, justifying the discharge of the plaintiff,—to which there was a replication of *de injuriâ*; and to the third and fourth counts, payment in satisfaction.

A verdict was entered for the plaintiff on the plea of non assumpsit as to the second count, and also on the pleas of justification and payment; and for the defendant on the plea of non assumpsit, except as to the second count. Judgment was afterwards arrested on the second count. The Master on taxation of costs allowed to the defendant the general costs of the cause, and allowed as part of them, the costs of two copies of the deed of settlement, which was very long. He also refused to allow the plaintiff the costs of certain witnesses called by him in support of the issue on the special plea to the first count, on which he succeeded; because their evidence was applicable to other issues also. A rule nisi for reviewing the Master's taxation was granted, and these points fully discussed.

As to the first, which was the most important, it was contended, that the right of the defendant to costs depended upon the statute 23 Hen. 8, c. 15, (extended to all actions by the 4 Jac. 1, c. 3,) which enacted that in certain actions "if the plaintiff," "after appearance of the defendant," "be nonsuited, or that any verdict happen to pass by lawful trial against the plaintiff," "the defendant," "in every such action," "shall have judgment to recover his costs" against the plaintiff, "to be assessed and taxed at the discretion of the Court," &c.; and that this statute did not entitle the defendant to costs, unless the verdict was in his favour on the whole record: whereas, in this case, the verdict was in favour of the plaintiff on both the issues

raised as to the second count, upon which the judgment was arrested. The case of *James v. Brook* (a), decided by *Erle*, J., in the Bail Court, is certainly expressly in point; and if that was rightly decided, this rule should be made absolute. But, after mature consideration, it appears to us, that the statute of 23 Hen. 8, c. 15, as construed in several cases, applies, although the defendant cannot have a verdict in his favour on every part of the record. Thus in *Day v. Hanks* (b), in which the declaration contained two counts in case for disturbances in two distinct commons, and as to the first the defendant suffered judgment by default; and as to the second, took issue and obtained a verdict; the Court held, that as to that the defendant was entitled to judgment and his costs, although he could not have a verdict and judgment on every part of the record. And in *Thornton v. Williamson* (c), an action of trespass quare clausum fregit, defendant pleaded two different rights of way, upon which the plaintiff took issue and new assigned, extra viam. As to that, defendant suffered judgment by default. At the trial, damages were assessed on that judgment. The plaintiff obtained a verdict on the issue as to one right of way, and the defendant on the issue as to the other; and it was held that the defendant was entitled to the general costs of the cause; although it was manifest that he had not a general verdict in his favour, nor could he have judgment on every part of the record. *Cross v. Johnson* (d) is to the same effect. The attention of Mr. Justice *Erle* does not appear to have been drawn to these cases by the counsel who argued *James v. Brook* (a). It was assumed that the statute 23 Hen. 8, c. 15, did not give the defendant costs in such a case; and the question was treated as depending upon the new rules as to the allowance of costs upon particular issues found for the plaintiff and defendant. But we think that the statute does

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✓(a) *Ante*, vol. 4, p. 577.

✓(b) 3 T. R. 654.

✓(c) 13 East, 191.

✓(d) 9 B. & C. 613.

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apply to this case, which differs from those only in the circumstance, that as to the second count the plaintiff obtained a verdict, and judgment was arrested; but it seems difficult to say upon what principle a plaintiff is to be in a better position, where he has obtained a verdict on an issue joined on a count so defective, that he can have no judgment; than where he has judgment by default on a good count, as in *Day v. Hanks (a)*. As far as costs are concerned, the count on which judgment was arrested, is removed out of the way. There is no effective verdict where judgment is arrested; and, although it may be true that the defendant cannot have judgment on every part of the record; yet, on the whole record, the judgment is in his favour, and we think the Master was right in allowing him the general costs of the cause.

As to the issues found for the plaintiff on the pleas to the first, third, and fourth counts, the Master would not allow the costs of his witnesses, because they were not exclusively applicable to those issues. The Master was the proper party to judge whether the evidence of the witnesses was exclusively applicable to the issues found for the plaintiff; and, as he decided that it was not, the plaintiff not being entitled to the general costs of the cause, was not entitled to have them allowed, according to several decisions; *Lardner v. Dick (b)*; *Knight v. Woore (c)*; *Crowther v. Ekwoell (d)*.

The remaining point as to the allowance of the copies of the deed, we think was a matter for the discretion of the Master; and we see no reason for saying that the manner in which he has exercised it, is in contravention of any rule of law, or the practice of the Court. The rule for reviewing his taxation must, therefore, be discharged.

Rule discharged.

✓ (a) 3 T. R. 654.

(b) 2 C. & M. 389.

· (c) 3 Bing. N. C. 534.

✓ (d) 4 M. & W. 71.

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CHANNELL, Serjt., moved for a rule nisi requiring the plaintiff to give security for costs on the ground of his having become insolvent. It was an action for the infringement of a patent and was commenced in July, 1842. The declaration contained counts in respect of the breach of two patents. At the trial, which took place at the Liverpool Summer Assizes, 1843, he abandoned his claim in respect of one of the patents, but obtained a verdict in respect of the other. A rule for a new trial was afterwards granted, and ultimately made absolute, in Trinity Term, 1844. On the 9th of November, 1847, the plaintiff was taken in execution, and, on the 25th of the same month, committed to the Queen's Prison. An execution creditor subsequently presented a petition to the Insolvent Court, and a vesting order was made in pursuance of the 1 & 2 Vict. c. 110, ss. 36 and 37, which accordingly vested the plaintiff's estate in the provisional assignee. Subsequently, the plaintiff gave notice of trial for the sittings after the present Hilary Term. The object of the present application was to stay proceedings until the plaintiff or his assignee gave security for costs. The affidavit on which the application was founded, stated that the defendants had a good defence upon the merits, but that the costs of the defence would be very considerable; and that notice of this application had been served upon Sturges, the provisional assignee of the plaintiff. It did not appear that the assignee had interfered in prosecuting the present action; and being a tort, the right of action would not vest in the assignee. There was, however, no doubt that the assignee would be disposed to lend assistance to the insolvent in the action; and if it succeeded, that would establish the patent right, and thus benefit the insolvent's estate, which had vested in the

The Court refused to grant a rule, in an action of tort, compelling the plaintiff to give security for costs on the ground of his insolvency; no ground being shewn for believing that the action was prosecuted for the benefit of the plaintiff's assignee.

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assignee. In *Denton v. Williams* (a), after a verdict in favour of the plaintiff, and a rule for a new trial made absolute, he became bankrupt, and the Court compelled him to give security for costs, although there was no affidavit that the action was carried on for the benefit of the assignees. That also was an action of tort, as it was for running down a ship. [*Wilde*, C. J.—Is there any fact shewn on the affidavit which proves that the assignee is proceeding with the action?] No such fact appears; but it is quite competent for him to interfere, as the present action is brought to try a right. The Court of Exchequer granted a similar application in *Mason v. Polhill* (b). That was an action of tort for pirating an opera, and the assignee of the insolvent plaintiff having proceeded with the action after it had been commenced by the insolvent, was compelled to give security for costs. Then as to the insolvency of the plaintiff being involuntary, the petition being presented by one of his creditors, that could make no difference; *Heaford v. Knight* (c); *Wray v. Brown* (d).

WILDE, C. J.—In this case the assignee, if he thinks proper, can secure the benefit of the plaintiff's patent right by much more easy means than by proceeding in this action. Why then should we presume that he will do so? The presumption is rather the other way. Before we can interfere in the mode proposed, we ought to be furnished with some facts which will render it at least probable that he intends to proceed. None such have been disclosed in support of this application, and, therefore, I think that the Court ought not to grant this application.

MAULE, J.—The poverty of a plaintiff does not estop him from proceeding with his action. But if it is shewn

✓ (a) 8 Dowl. 123.

& R. 81.

✓ (b) 2 Dowl. 61; S. C. 1 Cr. & M. 620.

(d) 8 Scott, 557; S. C. 6 Bing. N. C. 271; 8 Dowl. 279. ✓

(c) 2 B. & C. 579; S. C. 4 D.

that he is proceeding for the benefit of another, then it is reasonable that security for costs should be required. In the present case, however, that is not shewn; therefore I think that this rule ought not to be granted.

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CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused.

ENGSTROM and Others v. BRIGHTMAN and Others. *J. C. & Cb. 419*

THIS case being called on in its order in the special paper, it appeared to be a special case stated in pursuance of the provisions of the 3 & 4 Wm. 4, c. 42, s. 25, the words of which are, "that it shall be lawful for the parties in any action or information, after issue joined by consent, and by order of the Judges of any of the superior Courts, to state the facts of the case in the form of a special case, for the opinion of the Court; and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or of nolle prosequi, immediately after the decision of the case or otherwise, as the Court may think fit, and judgment shall be entered accordingly." The case, after stating certain facts, concluded by a clause which permitted either party, if dissatisfied with the decision of the Court, to turn the case into a special verdict, the Court drawing such inferences in fact as a jury might draw.

Where a special case has been stated in pursuance of the 3 & 4 Wm. 4, c. 42, s. 25, the Court will not hear it argued if it contains a clause that the Court may draw such inferences as a jury might draw, and the parties to be at liberty to turn the special case into a special verdict. ✓

Channell, Serjt., (with whom was *Peacock*), appeared on behalf of the plaintiffs.

Kinglelake, Serjt., (with whom was *M. Smith*), appeared for the defendants.

MAULE, J.—This appears to me a very inconvenient practice, and which I do not feel inclined to sanction, without the leave of the Court being obtained. The Court

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is to draw inferences of fact in the same manner as a jury would, and we may all arrive at the same conclusion, but from a different state of facts. But those facts must be stated in the special verdict, and then the Court of Error before which the record went, would form its judgment on a different state of facts from that on which we had pronounced.

CRESSWELL, J.—The statute under which this case is stated gives no power to the parties to turn it into a special verdict.

WILLIAMS, J.—Should this course be allowed, a false jury process and panel must be placed on the record.

MAULE, J.—By the words of the statute, an absolute consent to the opinion of the Court being final on the case stated is contemplated. But the consent here is coupled with a condition that the case on which the Court has decided should be turned into a special case at the option of the parties. There is, consequently, no such consent as comes within the statute.

On the part of the defendants it was proposed to consent that the argument should take place on the facts as they now appeared, and that the judgment of the Court should be final.

On the part of the plaintiff this course was objected to, as the facts, it was suggested, were improperly stated.

MAULE, J. (a)—The case must be struck out, unless the parties agree to strike out of the case the clause with reference to the special verdict.

The parties afterwards consented that the amendment suggested by the Court should be made, and the case stood over accordingly.

(a) *Wilde*, C. J., was not present.

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THE declaration contained several counts by a reversioner for an injury to his reversion, but the last count was the only one on which the argument arose. That alleged that the defendant had dug, excavated, and widened a certain channel or leat in and through the said closes, thereby injuring the plaintiff's said reversionary interest. To the declaration the defendant pleaded several pleas, and, ninthly, to the last count.

Ninth plea to the last count. That before and at the several times of the committing of the alleged grievances in that count mentioned, William Higman was and still is the occupier of a certain close and tenement called Gimble Mill, near to the said closes, in the said last count mentioned; and that the channel or leat in that count mentioned had been and was, during all the time in this plea mentioned, connected with a like channel or leat leading from the said channel or leat in the said last count mentioned, unto, into, and through other closes beyond the said closes in the said last count mentioned, and lower down the stream hereinafter mentioned, and thence unto, into, and through the said closes and tenement called Gimble Mill, and thence unto, into, and through other closes farther down the stream of water hereinafter mentioned, and beyond the last-mentioned close and tenement, and which last-mentioned channel or leat so connected with such first-mentioned channel or leat during all the time in this plea mentioned, remained and were one connected channel or leat. And the defendant further saith, that the water from time to time being, and flowing in and along the said channel or leat, in the said last count mentioned, hath run and flowed, and hath been used and accustomed to run and flow, and of right ought to have run and flowed, for the full period of twenty years next before the commencement of this suit,

In an action on the case by a reversioner for widening, &c., a watercourse, the defendant pleaded a right to the watercourse for twenty years, and that he had of right, as often as required, scoured and widened the watercourse. The plaintiff replied traversing the right to the watercourse, as well as to scour and widen : *Held*, on special demurrer, that the replication was not double.

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and still of right ought to run and flow without interruption, and as of right, into, through, over and along the said several closes and tenements, and in and along the said one connected channel or leat hereinbefore mentioned, from certain other closes beyond the said closes in the last count mentioned, and higher up the stream of the said water, unto, into, and through the said channel or leat in other closes beyond the said closes and tenements in the said last count mentioned, and lower down the said stream, and thence unto, into, and through the said channel or leat in the said close and tenement called Gimble Mill aforesaid, and thence to other closes and tenements beyond that close and tenement, and lower down the said stream. And the defendant further saith, that the said W. Higman, whilst such occupier as aforesaid, and all other prior occupiers for the time being of the said close and tenement called Gimble Mill, have, and each of them hath, as of right and without interruption, for the full period of twenty years next before the commencement of this suit, had, used, and actually enjoyed, and have been used and accustomed to have, use, and actually enjoy, as of right and without interruption; and the said W. Higman, at the said several times when, &c., of right ought to have had, and used and actually enjoyed as of right and without interruption, and still of right ought to have and use, and actually enjoy, as of right and without interruption, for himself and themselves, whilst occupiers of his said close and tenement called Gimble Mill, a stream and watercourse, and the water thereof flowing in, through, along, and over the said several closes and tenement, and in and along the said one connected channel or leat hereinbefore mentioned, for the purpose of supplying the said close and tenement called Gimble Mill with water, and for the benefit and advantage of the occupiers of the same close and tenement, and for mining and other useful purposes therein, as to the same close and tenement belonging and appertaining. And the defendant further saith, that the said W. Higman, whilst such occupier

as aforesaid, and all other prior occupiers for the time being of the same close and tenement called Gimble Mill, have, and each of them hath, as of right and without interruption, for the full period of twenty years next before the commencement of this suit, scoured and amended, and have been accustomed as of right and without interruption, and ought as of right and without interruption, to scour and amend; and the said W. Higman, at the said several times when, &c., as of right and without interruption ought, and still as of right and without interruption ought, himself and themselves, with his and their servants and agents, whilst occupiers of the same close and tenement called Gimble Mill, to scour and amend the said stream and watercourse, channel, or leat, in the said last count mentioned, when and as often as the same required and requires scouring and amending, as to his said close and tenement called Gimble Mill, belonging and appertaining. And the defendant further saith, that the said stream and watercourse, channel or leat, in the said last count mentioned, being before and at the said several times when, &c., foul, choked up, miry, and out of repair, and then requiring to be scoured and amended, the defendant, as the servant of the said W. Higman, and by his command, at the said several times when, &c., being reasonable times in that behalf, scoured and amended the said stream and watercourse, channel or leat; and in so doing, at the said several times when, &c., did necessarily and unavoidably, on the occasion aforesaid, and for the purpose of scouring and amending the same stream and watercourse, channel or leat, and because the same could not otherwise have been scoured and amended, a little dig, excavate, and widen the said channel or leat in the said last count mentioned, doing no more damage to the reversion of the plaintiff in the last count mentioned, on the occasion aforesaid, than was necessary and unavoidable for the purpose aforesaid, and without digging, excavating, or widening the same channel or leat beyond the proper size and dimension thereof

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during the time aforesaid, or more or otherwise than the same had during all the time aforesaid been, and been used and accustomed to be dug, excavated, and widened, when the same and the said stream and watercourse required scouring and amending, and were scoured and amended as aforesaid during the time aforesaid, which are the same alleged grievances in the said last count mentioned. Verification.

Replication, that the said W. Higman, whilst such occupier as in the said ninth plea alleged, and the prior occupiers for the time being of the said close and tenement called Gimble Mill, have not as of right and without interruption, for the full period of twenty years next before the commencement of this suit, had, used, and actually enjoyed, nor been used and accustomed to have and use, and actually enjoy, as of right and without interruption, nor of right ought the said W. Higman, at the said several times when, &c., or any of them, to have had and used, and actually enjoyed, as of right and without interruption, for himself and themselves, whilst occupiers of the said close and tenement called Gimble Mill, a stream and watercourse, and the water thereof flowing in, through, along, and over the said several closes and tenement in the said ninth plea in that behalf mentioned, or in and along such supposed connected channel or leat as in that plea mentioned, for the purposes in the said ninth plea in that behalf mentioned; and that the said W. Higman, whilst such occupier as last aforesaid, and the prior occupiers for the time being of the same close and tenement called Gimble Mill, have not, as of right and without interruption, for the full period of twenty years next before the commencement of this suit, scoured and amended, nor been used and accustomed, as of right and without interruption, to scour and amend, whilst occupiers of the said close and tenement called Gimble Mill, the said stream and watercourse, channel or leat, in the said last count mentioned, when and as often as the same required or requires scouring

and amending, as to the said close and tenement called Gimble Mill, belonging and appertaining in manner and form, &c.

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To this replication the defendant demurred specially, on the ground that it was double and multifarious.

T. Jones, in support of the demurrer. The plea endeavours to justify the wrongful acts alleged in the declaration to have been committed by the defendant. Those acts consisted of injuriously digging and widening the channel in question. The justification was the right to scour the channel in respect of the right to the watercourse. Two independent rights were therefore set up. It was consequently necessary that the plaintiff should shew the one to be incidental to the other, in order to be entitled to put them both in issue. This had not been done, and, therefore, the replication was double, as it sought to put them both in issue. In order to sustain the plea, it would be sufficient at nisi prius for the defendant to prove the alleged right to scour the channel. The substance of the plea as affording a justification was an alleged right to scour as incident to the right to the channel. According to the resolution in *Crogate's case* (a), the plaintiff was not in a situation to reply de injuriâ. He was, therefore, bound to select some allegation in the plea on which to take issue. He could not be permitted, by his mode of replying, to compel the defendant to prove more than would be sufficient to sustain his plea. If he did, then the replication would be bad. The cases of *Regil v. Green* (b); *Thurman v. Wild and Another* (c); *Moore v. Boulcott* (d), were authorities to that effect. But the effect of the replication as pleaded in the present case, was to compel the defendant to prove both the right to the watercourse, and the right to scour. It was, therefore, clearly open to the objection of duplicity.

✓ (a) 8 Rep. 66.

& D. 289.

✓ (b) 1 M. & W. 328.

✓ (d) 1 Bing. N. C. 323; S. C.

✓ (c) 11 A. & E. 453; S. C. 3 P.

1 Scott, 122; 3 Dowl. 145.

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Montague Smith, in support of the replication. The effect of the plea was to set up one prescription, namely, the right to the channel; and, as incidental to that right, that of scouring. Unless the plea was read as setting up such a prescription, it was insensible. The defendant would, at the trial, be bound to prove the whole prescription as alleged. In the case of *Richards v. Fry* (a), where a plea similar to the present was pleaded under the 2 & 3 Wm. 4, c. 71, the Court held that the plea could not be construed in the way proposed by the plaintiff. In *Bailey v. Appleyard* (b), *Littledale, J.*, was of opinion that it was necessary for the defendant to prove that the right in question related to some definite easement. He there said, speaking of the cattle, "it was necessary to prove that they were put on with a view to some definite easement which might be claimed under the statute in virtue of twenty years' enjoyment." Unless, therefore, the defendant was in a situation to prove the prior part of the plea as justifying the latter part, the defendant must fail. In the case of a contract, it might consist of several parts. If so, it was quite competent for the opposite party to traverse all. The same principle applied to a prescription. Where the several matters constituted but one defence, the whole might be put in issue by one traverse. This was held in *Bell v. Tuckett* (c), and in *Pim v. Grazebrook* (d).

T. Jones replied. The effect of the case of *Richards v. Fry* was merely to decide that where a que estate was set up, the plea could not be construed as alleging a right of common in respect of mere possession. Again, in the case of *Bailey v. Appleyard*, all that was there decided was, that the plea in that case did not sufficiently shew the purpose for which the easement was claimed. That was the

✓ (a) 7 A. & E. 698; S. C. 3 N. & P. 67.

✓ (b) 8 A. & E. 161, 166; S. C. 3 N. & P. 157.

(c) 3 M. & G. 785; S. C. 4 Scott, N. R. 402; 1 Dowl. 458, N. S.

✓ (d) *Ante*, vol. 3, p. 454; S. C. 2 C. B. 429.

whole effect of the observations made by *Littledale*, J. [*Cresswell*, J.—The plea alleges a right to scour, and, it is necessary that the plea should shew for what purpose it is to be scoured.]

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MAULE, J. (a)—It seems to me that the replication in this case properly traverses the plea. This plea is to be understood as setting up one single quasi prescription, and it is a rule, that if a prescription is pleaded larger than is necessary, the party pleading it must prove every part of it if it is traversed, and the plaintiff is bound to traverse the whole of it; in the same manner where a plea sets up a grant of several things, if the grant is put in issue, he must prove it in its entirety. It is not necessary in pleading such a grant, to state more than is requisite for the purpose of a defence, but if more is pleaded, it must be proved as pleaded. This was the principle applicable to cases before Lord *Tenterden's* Act came into operation. Now, to apply that principle to the present case, it seems to me, that since Lord *Tenterden's* Act, this plea must be treated as alleging the use and enjoyment of one right, although it may consist of several things. A prescription may consist of a number of things which exist either by a grant, or by that which by means of user is equivalent to a grant. Now, the present plea is in effect that the defendant or those who occupied Gimble Mill had for twenty years past enjoyed a watercourse as appurtenant to their close, and that they have, during all that time, scoured and amended the watercourse as often as was required, as appurtenant to their close. Now, it is insisted, that this plea is to be understood as a plea of two separate prescriptions; the one as connected with the watercourse, and the other as a right to scour the watercourse as often as it requires scouring, independent of the enjoyment of that watercourse. But, supposing that to be a possible construction, from the present state of the pleadings, it appears to me that the plea alleges, that during twenty years, those

(a) *Wilde*, C. J., was absent.

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who have enjoyed the mill have enjoyed the right to go on the adjoining ground to scour out the ditch. But the necessity of scouring, independent of the right to the mill, and without reference to it, could in no way be restricted. That of itself furnishes a strong reason for construing this prescription as one. I think it is relied on by the defendant in his plea, although there may be some surplusage contained in it, as one right, and that the plaintiff has understood it, and replied to it accordingly. I am, therefore, of opinion that the replication is good, and not objectionable for duplicity.

CRESSWELL, J.—I am of the same opinion. There may be a difficulty in ascertaining the precise meaning of the plea, as it is in some degree ambiguous. But I think the fair construction of it is, that the right to the water is connected with the right to scour and repair the watercourse. If so, then the plaintiff was right in traversing, by his replication, the whole of the prescription set up. The case of *Morewood v. Wood and Another* (a) decided, that if a defendant set up in his plea a prescription in two commons lying open to each other, the plaintiff was bound to traverse in his replication the whole of the prescription alleged.

WILLIAMS, J.—I am of the same opinion. The main argument used on behalf of the defendant is, that the replication seeks to put in issue the right in respect of the water which it is said is surplusage. But I am strongly of opinion, that if that right had not been alleged in the plea, that is, if this supposed surplusage had not been stated, it would have been bad, as it was requisite to state the nature of the right set up by the defendant, so as to shew that it came within the meaning of Lord *Tenterden's* Act.

Judgment for the Plaintiff.

✓ (a) 4 T. R. 157.

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PASHLEY shewed cause against a rule obtained by *Crowder*, for setting aside a nonsuit. It was an action on the case, and the declaration complained that the defendant theretofore, to wit, on the 18th of November, 1846, and from thence until and at the time of the injury being sustained by the plaintiff as thereafter mentioned, wrongfully, wilfully, and injuriously did keep a certain dog of a ferocious and mischievous disposition, and dangerous to go at large; he, the defendant, during all that time, well knowing that the said dog was, and during the whole of the said time continued to be, of a ferocious and mischievous disposition as aforesaid, and that he was dangerous to be suffered to go at large; and during the whole of the said time it was and continued to be the duty of the defendant to use due and reasonable care and precautions in and about the safe keeping and management of the said dog. Yet the defendant, well knowing the premises, but not regarding the duty of him, the defendant, in that behalf as aforesaid, afterwards, to wit, on the 19th of November, 1846, and whilst the defendant so kept and continued to keep the said dog, so being and continuing to be of such disposition as aforesaid, did not and would not use such due and reasonable care and precautions in and about the keeping and management of the said dog; but, on the contrary thereof, so negligently did keep the said dog, that he wrongfully, injuriously, and negligently suffered the said dog to go at large, and thereupon and by reason of the premises, and of the wrongful, injurious, and negligent conduct of the defendant in so negligently keeping and using the said dog as aforesaid, and whilst the defendant so kept and continued to keep the said dog as aforesaid, and whilst the said dog was and continued to be of such disposition as aforesaid, to wit, on the said 19th of November, 1846, the said dog did hunt, chase, drive, bite, and

Case for so negligently keeping a mischievous dog, knowing his mischievous propensities, that he worried the plaintiff's sheep. Plea, not guilty: *Held*, that this plea put in issue the scienter.

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worry divers, to wit, fifty sheep and fifty lambs of the plaintiff, of great value, to wit, of the value of 2*l.* each, by means whereof divers, to wit, twenty of the said sheep and twenty of the said lambs of the plaintiff of great value, to wit, of the value of 20*l.*, then and before the commencement of this suit died, and became of no value to the plaintiff; and the residue of the said sheep and lambs being also of great value, to wit, of the value of 2*l.* each, were and each of them was otherwise greatly terrified, damaged and injured, and rendered of little use or value to the plaintiff, to the damage of the plaintiff of 50*l.*, &c. The defendant pleaded not guilty. The cause was tried before *Williams*, J., at the Spring Assizes, 1847, for Somersetshire, and no evidence being adduced to shew the defendant's knowledge of his dog's mischievous propensities, the plaintiff was nonsuited, the amount of damages done by the dog being admitted to be 9*l.* 15*s.* For this sum, it was agreed that the plaintiff should be at liberty to enter a verdict, if the Court should be of opinion that the scienter was put in issue by the plea of not guilty. It was submitted, that as the plea of not guilty put in issue under the new rules the wrongful act, and as no wrongful act was done by the defendant, unless he was aware of his dog's propensities, the plea of not guilty must put that allegation in issue. This the plaintiff had not proved, and, therefore, the nonsuit was correct. He cited *Jackson v. Smithson* (a); *Thomas v. Morgan* (b); and *May v. Burdett* (c). [He was then stopped by the Court.]

Crowder and *Phinn*, in support of the rule. 'The question was as to the effect of the plea of not guilty in this form of action. It was quite clear that the plea of not guilty did not put in issue the inducement to the alleged wrongful act. By the pleading rules of Hilary Term, under the

✓ (a) 15 M. & W. 563; S. C. 4 Dowl. 223.

ante, vol. 4, p. 45.

✓ (c) 9 Q. B. 101.

(b) 2 C., M. & R. 496; S. C.

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head of *actions on the case*, it was ordered, "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." Now, all the allegations in this declaration previous to the allegation of biting the plaintiff's sheep by the defendant's dog, in consequence of his being negligently kept, constituted inducement only. The wrongful act, therefore, which the plea of not guilty put in issue, was the negligent keeping of the dog, which was of a ferocious disposition. [*Maule, J.*—The cases of *May v. Burdett*, *Thomas v. Morgan*, and *Jackson v. Smithson*, are directly in point to shew that the knowledge of the defendant is the gist of the action.] The decision of the Court in *May v. Burdett*, proceeded on an objection taken after verdict to the declaration; and in *Jackson v. Smithson*, the same observation was applicable, and no reasons were stated by the Court for the conclusion at which they arrived. But in *Torrence v. Gibbins* (a) it was held, that in an action for debauching the plaintiff's daughter, although there was no right of action unless there was a loss of service, the plea of not guilty did not deny the service. Again, in *Dunford v. Trattles* (b), to a declaration stating that the defendant was possessed of a ship, which, by the carelessness and mismanagement of his servants, ran foul of and damaged the plaintiff's ship, the plea of not guilty admits that the defendant was possessed of the ship, and only denies that the injury was occasioned by the carelessness of his servants. The cases of *Wright v. Lainson* (c); *Hart v. Crowley* (d); *Mummery v. Paul* (e), were to the same effect. [*Williams, J.*—In *Taverner v. Little* (f), which was an action for negligently driving the

✓ (a) 5 Q. B. 297; S. C. 1 D. & M. 226.

(d) 12 A. & E. 378.

✓ (b) 12 M. & W. 529; S. C. ante, vol. 1, p. 554.

(e) 1 C. B. 316; S. C. ante, vol. 2, p. 582.

✓ (c) 2 M. & W. 739; S. C. 6 Dowl. 146.

✓ (f) 5 Bing. N. C. 678; S. C. 7 Scott, 796.

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defendant's horse and cart against the plaintiff's horse, this Court held, that under the plea of not guilty, the defendant could not shew that he was not the person driving, and that the cart did not belong to him. That case is distinguishable from the present, as keeping the cart and horse was an innocent act; but keeping a ferocious dog knowingly is not an innocent act, as the cases of *May v. Burdett* (a), and *Thomas v. Morgan* (b), have decided. *Maule, J.*—The meaning of "inducement" in the new rules appears to be a something which is not in itself an unlawful act.]

COLTMAN, J.—In this case, it appears to me that the plea of not guilty puts in issue the fact of keeping the dog as well as the plaintiff's knowledge that he was ferocious. By the new rule of pleading, which applies to actions on the case, it is ordered, that "in actions on the case the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." Now the question is, what is the wrongful act of which the plaintiff in this case complains? In order to make the declaration good, it was necessary to allege that the dog was ferocious, as that made the act wrongful. That was the material averment, and, consequently, was put in issue by the plea of not guilty. If it were necessary to constitute the wrongful act that the dog was kept negligently, that would be put in issue by not guilty also. The case, however, of *May v. Burdett*, has decided that it is not necessary to allege the negligence in keeping the animal, as negligence is not essential to constitute the wrongful act. It seems to me, that the case of *Wright v. Lainson* (c) is an authority in favour of the defendant. There, the falseness of the sheriff's return was the wrongful act of which the

✓ (a) 9 Q. B. 101.

✓ (c) 2 M. & W. 739; S. C. 6

✓ (b) 2 C., M. & R. 496; S. C. Dowl. 146. ✓

4 Dowl. 223.

plaintiff complained, and which was put in issue by the plea of not guilty; so here, the keeping a ferocious dog, knowing its nature, was the act of which the plaintiff complained, and which was consequently put in issue by the defendant's plea.

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MAULE, J.—The effect of the plea of not guilty according to the new rules in actions on the case, is to put in issue the wrongful act or omission of duty with which the defendant is charged. If there are several wrongful acts or omissions of duty alleged in the declaration, the plea of not guilty puts them all in issue. In this case, it was sufficient for the plaintiff, in order to shew a good cause of action, to allege that the defendant knowingly kept a ferocious dog, and that the plaintiff received an injury from it. No doubt, the declaration in this case alleged that it was the duty of the defendant to use due care in keeping the dog. If, however, it was not a part of his duty to use due care in keeping the dog, the introduction of those words would not make it so. Those are words which state a mere inference of law. It was quite unnecessary to allege negligence in the mode of keeping. If, however, keeping the dog negligently was a wrongful act, the plea of not guilty would put that in issue also. But, according to the cases of *May v. Burdett*, and *Jackson v. Smithson* (a), the mere keeping such a dog with the knowledge of his disposition, and an injury accruing to the plaintiff in consequence, affords a good cause of action. The proof of the scienter, therefore, was essential to maintaining the plaintiff's declaration, and, therefore, the nonsuit was right.

WILLIAMS, J. (b), concurred.

Rule discharged.

(a) 15 M. & W. 563; S. C. *ante*, vol. 4, p. 45. ✓

(b) *Gresswell, J.*, had left the Court.

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S. C. S. C. B. 295.

HODGE v. CHURCHYARD.

Until issue is joined, the Court will not grant a rule for changing the venue, on the ground that the witnesses on both sides in the cause reside in a county different from that in which the plaintiff has laid the venue.

GREENWOOD moved for a rule to shew cause, why the venue should not be changed from London to Devonshire. He moved on an affidavit which stated that the present was an action of slander, for words uttered many years before. The defendant had pleaded not guilty and a justification. The venue had been laid by the plaintiff in London, but nearly all the witnesses on both sides were resident in Devonshire. No replication had at present been delivered, and consequently issue had not at present been joined. The general practice was that where issue had not been joined an application like the present was not granted. The case, however, of *Dowler v. Caller (a)*, was an authority to shew that where the Court could see what the real issue between the parties must ultimately be, the venue would be changed before the issue was formally joined. Now here, there could be no doubt that the plaintiff would deny the truth of the plea alleging the justification, and on that replication issue would be joined. In *Cotterill v. Dixon (b)*, the Court allowed the venue to be changed on special grounds after plea pleaded and before issue actually joined. [*Maule, J.*—The established rule of practice is not to grant such applications as the present until issue is joined. Before the Court will grant such an application, it requires to be informed where the witnesses reside. But how can the defendant give the Court that required information until he knows what the plaintiff will reply? He cannot till then know what facts it will be requisite to prove, and until he knows what facts are to be proved, he cannot tell the residence of the witnesses required to prove them.]

PER CURIAM.

Rule refused.

✓ (a) 7 Dowl. 55; S. C. 4 M. & W. 531. ✓

✓ (b) 2 Dowl. 112; S. C. 1 Cr. & M. 661.

1848.

PINKUS v. STURCH and Others.

S.C. 5. Ch. 174.

CROMPTON moved for judgment as in case of a nonsuit. It was an action against four persons named Sturch, Hoskins, Shaw, and Wollaston. The defendants severed in their pleas. In the year 1840, issue was joined against the two defendants, Sturch and Hoskins. The defendant Shaw after pleading, but before issue was joined, died; and in 1845, the defendant Wollaston died without having pleaded. No doubt a difficulty arose in making the present application as the record was not yet made up. That was no doubt the case with reference to the two deceased defendants, but as between the plaintiff and the two defendants who had pleaded and with whom issue was joined, the roll must be considered as made up. [*Wilde, C. J.*—If it were proposed to enter up judgment in the present state of the record, it would not appear that the defendants were in a position to make the application. The action is against four, but it appears that issue is only joined as to two. Without some suggestion, to explain this inconsistency, there would appear to be no ground for signing the judgment.] If a suggestion were necessary, then it being the plaintiff's duty to enter the suggestion, he had been guilty of neglect in not doing so, and consequently had not proceeded "according to the course and practice of the Court." [*Maule, J.*—After issue joined, the proceedings are entered upon the record, and that entry is followed by the writ of venire facias. In that case, not the plaintiff but the Court speaks.] It was his duty to come to the Court and state that two of the defendants were dead, and that being stated on the record, enough would then appear to warrant the Court in commanding the sheriff to have the jury, &c. [*Wilde, C. J.*—Perhaps the plaintiff may not know of the defendants' death. It appears to me that the proper course would be to apply to a Judge at Chambers to order the plaintiff to bring in the

Where, in an action against four persons, issue was joined as to two, but the third died after declaration, and before plea, and the fourth died after plea and before issue joined; the Court held, that judgment as in case of a nonsuit could not be obtained by the survivor, without entering a suggestion on the record of the death of the deceased defendants.

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roll and enter the suggestion of the defendants' deaths, and for leave, in case the plaintiff should make default, for the defendants to enter a suggestion. The defendants might then be in a situation to sign judgment as in case of a nonsuit.] But there is now no roll, as since the rules of Hilary Term, 4 Wm. 4, the first entry of the proceedings is on the nisi prius record. It was difficult, therefore, to know on what the suggestion ought to be entered.

WILDE, C. J.—In contemplation of law there is always a roll going on, or at any rate the materials for it. Unless the death of the deceased defendants is disclosed on the record by way of suggestion, it is inconsistent for two of several defendants to make the present application. If it should turn out, that the surviving defendants cannot find the means of placing the facts of the deaths on the record, still they are not in a situation to obtain a rule for judgment as in case of a nonsuit.

MAULE, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused.

—◆—
 EYRE v. SCOVELL and Others.

To a declaration in trover for hops, the defendants pleaded, that just before, &c.,

and until, &c., M. & Co. were possessed of the hops as of their own property, and casually lost them, and that immediately thereupon they came, by finding, to the possession of E., who immediately thereupon sold them to the plaintiff, whereupon and immediately before the time, &c., the defendants retook them, as servants to M. & Co., and for their use. Replication de injuria. Held upon the issue so raised, that the defendants could succeed only by proving possession in M. & Co. at the time of the alleged conversion; and, therefore, that evidence was admissible on the part of the plaintiff, to shew that M. & Co. had sold the hops to the person under whom he claimed.

To the same declaration a similar plea was pleaded, only alleging a different person in addition to E., through whose hands the hops were alleged to have passed, but not alleging the possession of M. & Co. down to the time of the plaintiff's conversion: Held, that similar evidence in answer to this plea was admissible to shew that M. & Co. had sold the hops to the person under whom the plaintiff claimed, as this plea also must be construed as alleging a continuing possession in M. & Co. at the time of the conversion complained of.

W. H. Watson, M. Chambers, and Kennedy shewed cause against a rule which had been obtained by Manning, Serjt., for a new trial on the ground of misdirection.

It was an action of trover for 200 pockets of hops.

The defendants pleaded twelve pleas, of which the fifth and tenth only were material. The fifth plea alleged, as to parcel of the goods in the declaration mentioned, to wit, as to forty of the said pockets of hops, that before and thence until the plaintiff became possessed of such last mentioned goods, and until and at the time of such sale thereof to him as hereinafter mentioned, certain persons, carrying on trade under the name, style, and firm of Meyer & Co., were possessed of the same as of their own property, and being so possessed, &c., afterwards and before the plaintiff became possessed thereof, to wit, on the 5th day of January, 1847, casually lost the same out of their possession, and immediately thereupon and before the plaintiff became possessed thereof, to wit, on the day and year last aforesaid, the same came by finding into the possession of one Thomas Fyre, who immediately thereupon and just before the same time, when, &c., in the declaration, sold and delivered the same to the plaintiff, who thereupon became and was thereof possessed, as in the declaration alleged, whereupon immediately and at the said time, when, &c. the defendants, as the servants, and at the command of the said Meyer & Co., seized and took the said goods out of the possession of the plaintiff and retook possession thereof to and for the use of the said Meyer & Co., and with the intent to deprive and divest the plaintiff of the property therein, and to revest the same in the said Meyer & Co., as they the defendants then did and as they lawfully might for the cause aforesaid; which is the said conversion in the declaration mentioned, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned.

Tenth plea. As to parcel of the said goods in the declaration mentioned, to wit, as to the said forty pockets of hops, the defendants say, that before the plaintiff was possessed thereof, certain persons, carrying on business under the name, style, and firm of Meyer & Co., were

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possessed thereof as of their own property, and being so possessed, afterwards, to wit, on the 5th day of January, 1847, casually lost the same out of their possession, and the same thereupon came by finding to the possession of one Samuel Bradley, who thereupon immediately lost possession of the same, and the same came by finding to the possession of one Thomas Eyre, who thereupon and just before the said time, when, &c., to wit, on the day and year last aforesaid, sold and delivered the same to the plaintiff, who thereupon and thereby became and was possessed thereof, whereupon immediately and at the said time, when, &c., in the declaration mentioned, the defendants, as the servants, and at the command of the said Meyer & Co., seized and took the said goods out of the possession of the plaintiff and retook possession of the same on behalf and to the use of the said Meyer & Co., with intent to divest and deprive the plaintiff of all property or possession thereof, and therein, and revest the same in the said Meyer & Co., as they the defendants then did and as they lawfully might for the cause aforesaid; which is the said conversion in the declaration alleged, so far as the same relates to the said parcel of goods in the introductory part of this plea mentioned. The plaintiff replied *de injuriâ* to both pleas.

The cause was tried before Lord *Denman*, C. J., at the Spring Assizes 1847, for the county of Surrey. Evidence was adduced by the defendants in support of the pleas for the purpose of shewing that the hops were originally in the possession of Meyer & Co.; that they then came fraudulently into the hands of Bradley, from him to Eyre, who received them with notice of the fraud, and were sold by him to the plaintiff, the latter having knowledge of the fraud. On the part of the plaintiff, evidence was adduced, for the purpose of shewing that the mode by which the hops came into the possession of Bradley, was by a *bonâ fide* sale, from Meyer & Co. to Bradley, and a subsequent *bonâ fide* sale, from Bradley to

Eyre. The Lord Chief Justice left it to the jury to say, whether the sale to Bradley was *bonâ fide* or not, and the jury found a verdict in favour of the plaintiff. The present rule was obtained on the ground that the only matters in issue at the trial were the previous possession of Meyer & Co., and the seizure of the hops by the defendants, as the servants of Meyer & Co., and consequently, that Lord *Denman* had misdirected the jury in telling them that they ought to find for the plaintiff, if they should be of opinion that there had been a *bonâ fide* sale by Meyer & Co. to Bradley.

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W. H. Watson, M. Chambers, and Kennedy, submitted that his Lordship's direction was quite correct. The effect of the replication of *de injuriâ*, was to put in issue all the material allegations in the plea. Now it was either an expressed or implied allegation in both pleas that the possession of Meyer & Co. continued down to the time at which the alleged conversion by the defendants took place. To allege a title in Meyer & Co. several years before the conversion would be absurd. It might be that the tenth plea was bad before verdict, for want of a sufficient allegation that Meyer & Co.'s possession continued down to the time of the conversion. But the plaintiff having pleaded over, the plea must be understood in such a sense as if possible to make it good; 1 *Wms. Saund.* 228 *a*, note (*e*), (*f*), 6th ed.; 2 *Ibid.* 10, n. (14); *The Edinburgh Railway Company v. Hebblewhite* (*a*); *The King v. Kilderby* (*b*). Here, if not alleged, in order to make the plea good, it must be implied, that the possession of Meyer & Co. continued down to the time of the alleged conversion. If the defendants pleaded, not possessed, the plaintiff would be bound on that issue to shew a title at the time of the alleged conversion, although there was no express

/(a) 6 M. & W. 707; S. C. 8 Dowl. 802.

/(b) 1 Saund. 312, *e*.

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allegation to that effect. It was laid down in *Com. Dig.* tit. "*Pleader*," (E. 5.) that "if the defendant in trespass *quare clausum fregit*, pleads that it was his freehold, he must say, at the time of the trespass, otherwise it will be bad." The plea in the present case was similar to a declaration in trover, and therefore what would be necessarily implied in a declaration, must also be implied in this plea; *Howarth v. Tollemache* (a).

Manning, Serjt., *Shee*, Serjt., and *Peacock*, in support of the rule. The derivative title to the plaintiff alleged in the pleas was only pleaded as colour. It could not, therefore, be traversed, and if the plaintiff was desirous of setting up his own title, he should have replied, shewing what his title was; *Vin. Abr.* tit. "*Colour*;" *Fenner v. Fisher* (b). The Chief Justice, therefore, misdirected the jury, when he told them that if they thought there was a *bonâ fide* sale from Meyer to Bradley, they should find for the plaintiff. His Lordship was wrong in admitting evidence which was of an affirmative character in support of a replication which was in its nature a negative. The plea alleged a title in Meyer & Co., "that they were possessed before the plaintiff became possessed," the replication de injuriâ simply denied that allegation. It was not competent, therefore, to adduce affirmative evidence on that issue in order to shew what the plaintiff's title was, when the only issue actually raised between the parties was as to the existence of Meyer & Co.'s possession antecedent to the plaintiff's possession. They also cited *Year Book*, Easter Term, 19 Hen. 8, fol. 7, pl. 7; *Rockwood v. Feasar* (c); *Pim v. Grazebrook* (d).

COLTMAN, J.—These pleas are so framed that the Court can hardly see what is colour and what is substance. They

✓(a) 4 M. & G. 427; S. C. 5 ✓(c) Cro. Eliz. 262.

Scott, N. R. 329.

✓(d) 2 C. B. 429; *Ante*, vol. 3, p. 454.

(b) Popham, 1.

amount, however, to an averment of title in Meyer & Co. down to the time of the alleged conversion. Unless they are so construed, there is no colour at all for the defendants. The rule is well established that the replication *de injuriâ* puts in issue all the material allegations contained in the plea. The continuance of Meyer & Co.'s title down to the time of the conversion is a material allegation in the plea, and, therefore, was put in issue by the replication. Evidence was therefore admissible for the purpose of disproving the title set up in the plea, and the Lord Chief Justice was right in directing the jury as he did. I do not say whether the tenth plea be demurrable or not, as that is not necessary now to be decided; but after verdict I think both pleas are substantially free from objection.

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MAULE, J.—I am of the same opinion. The same question is raised by the tenth as by the fifth plea, that is, whether at the time when the alleged conversion took place, the plaintiff was entitled to the possession of the goods; because if he was not, and the right of property in Meyer & Co., through whom the defendants claim, continued down to the time of the conversion, the plaintiff would not be entitled to recover. It appears to me to be very doubtful, whether the tenth plea is good; but if it is, then the possession of Meyer & Co. at the time of the conversion is put in issue by the replication *de injuriâ*. If that plea is bad for not containing an allegation of Meyer & Co.'s continuing title, then the plea is immaterial, and the plaintiff would clearly be entitled to succeed. Supposing the plea to contain such an allegation, and, therefore, good, then throwing aside all that relates to colour, the plea is in substance that Meyer & Co. were in possession of the hops at the time of the conversion, and that they authorized the defendants to take them. The plaintiff replies, that the defendants, of their own wrong, and without the cause alleged, converted them. It is

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said, that on this negative replication, affirmative matter, such as the title under Meyer & Co., cannot be shewn. It is quite true that some affirmative matters cannot be shewn under a negative pleading. The test is, whether matters, be they affirmative or negative, are such as tend to disprove the allegations contained in the pleading. Suppose in an action of trespass the defendant should plead a seisin in fee, under which he justifies committing the trespass, the plaintiff could not, on issue joined on *de injuriâ*, set up any right derived from the defendant by way of confession and avoidance; yet he might shew that the defendant had passed away his estate so as to negative the title in the defendant at the time of the trespass. This is not deriving a title from the defendant, but taking from him the title set up. So here, the plaintiff takes from Meyer & Co. the title set up in them, by shewing that they were not possessed at the time of the conversion.

CRESSWELL, J.—Assume the plea to be bad, still issue has been joined upon it, and that issue found for the plaintiff. It would, therefore, be quite useless to the defendants to disturb the verdict. If the plea is good, it must imply an allegation that Meyer & Co. were possessed at the time of the conversion. That was put in issue by the replication, and on that the jury have found for the plaintiff.

WILLIAMS, J., concurred.

Rule discharged.

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Ex parte HUTCHINSON.

COLE applied for the direction of the Court to the Master to receive and file a certificate of acknowledgment by a married woman, under the 3 & 4 Wm. 4, c. 74, s. 83. The jurat of the affidavit of verification to the certificate was in this form:—

“Sworn in the Island of Madeira, on the 27th of November, in the year of our Lord 1847. Before me,

(Signed)

GEORGE STODDART,

“Her Britannic Majesty’s Consul, and authorized by the laws of the Island of Madeira, to administer oaths in the Island of Madeira.”

“I, Servulo Nicolao Sowzao Drommond, notary public, &c., at Madeira, certify that her Britannic Majesty’s consul, as such, is entitled to administer oaths in the island of Madeira.”

The objection taken by the officer was, that a consul had no power to administer an oath, and, consequently, that an affidavit which appeared to have been sworn before that functionary, could not be received for the purposes of the statute. No doubt, it had been held in *Re Eady and Others* (a), that such an affidavit could not be received. This case, however, was distinguishable from that, as it appeared from the jurat of the affidavit, that a notary public certified that the British consul had power to administer an oath in the island of Madeira. That being so, it was submitted that the affidavit was like any other affidavit, sworn in a foreign country before a person, having authority by the laws of that country to administer an oath.

✓ C. S. C/P. 499

Although a British consul in a foreign country has not power *per se* to administer oaths of verification of the proceedings before a commission under the 3 & 4 Wm. 4, c. 74, s. 83; yet if a notary public in the foreign country certify that by the laws of that country the British consul has power to administer an oath, an affidavit of verification made before the consul will be received.

✓(a) 6 Dowl. 615; S. C. *dis. nom.* 6 Scott, 185; 4 Bing. N. C. 394.

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PER CURIAM.—As it appears that the notary has certified to the power of the British consul at Madeira to administer an oath, the Court is of opinion that the officer may receive the affidavit.

Motion granted.

10 C. 8. 1846.

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A declaration contained two counts. The first count was on an agreement by the defendant to take the plaintiff into his service for six months, and if when that period expired there was no just cause shewn to the contrary, to enter into another agreement for a further engagement for two years. Breach, that although at the expiration of the said six months, no just cause was shewn to the contrary, the defendant refused to enter into a further agreement for two years. The second count stated that the plaintiff had been in the service of the defendant for the space of six calendar months, and the defendant promised to enter into an agreement for two years more. Breach, that the defendant refused to continue him in such service: *Held*, that the two counts were evidently founded on the same agreement, and, therefore, amounted to a breach of r. 5 of the pleading rules of Hilary Term, 4 Wm. 4, Pt. II.

PETERSON shewed cause against a rule obtained by *Lush*, to rescind an order made by *Coltman*, J., for striking out, at the cost of the plaintiff, that part of the first count which related to the first breach.

The declaration was in assumpsit, and the first count stated, that whereas theretofore and before the commencement of the suit, to wit, on the 28th day of September, in the year of our Lord 1846, by an agreement then made by and between the plaintiff and the defendant, it was agreed that the defendant should take the plaintiff into his, the defendant's service, as clerk, to conduct his, the defendant's business of a custom-house and shipping agent, at Southampton, for the space of six calendar months, for the sum of 60*l*., being after the rate of 120*l*. for the year; and should also pay to the plaintiff, at the expiration of each three months from the date thereof, a sum of money equal to 50*l*. per cent. on the gross profits of all and any business the said plaintiff should introduce or cause to be introduced, through his connexion, to the defendant's business; and that at the expiration of the six months from the date thereof, should there be no just cause shewn to the contrary, the defendant thereby agreed to enter into a further agreement with the plaintiff, for a further engagement for

the term of two years, at the annual salary of 150*l*. for the first of such two years, and 160*l*. for the second of such two years, and also to pay to the plaintiff a sum of money equal to 50*l*. per cent. on the gross profits on any business the plaintiff should have introduced, or should thereafter introduce to the defendant's business; and it was thereby further agreed, that should there be any just cause shewn why a further agreement should not be entered into between the parties, the defendant should continue to pay to the plaintiff, for the space of twelve months from the date of the said agreement (though the plaintiff should not be in the service of the defendant after six months from the date of the said agreement), a sum of money equal to 50*l*. per cent. on the gross profits of the business introduced by the plaintiff; and it was thereby further agreed, that all sums of money received from the said business introduced by the plaintiff should be considered profits, except upon payments which had been actually made in reference to the business itself, office rent, clerks' salaries, and any other expenses but those named, not to be deducted from the profits. And the plaintiff further says, that afterwards, and within one calendar month after making the said agreement, to wit, on the 22nd day of October, in the year of our Lord 1846, the terms thereof were by another agreement made on the day and year last aforesaid, by and between the plaintiff and the defendant, altered and varied in manner following, that is to say, it was by the last mentioned agreement agreed, that with the exception of such overland agency business as the defendant was then in possession of, the defendant should pay to the plaintiff a sum of money equal to 50*l*. per cent. on the gross profits, without deduction for expenses except as aforesaid, on all such baggage business as was then in the defendant's possession as aforesaid, and the defendant also thereby gave his free consent to the plaintiff to permit him, the plaintiff, to conduct the wine agency business of one Henry Fenner, trading under the name, firm, and description of Messrs.

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Henry Fenner & Co., of London, on his, the plaintiff's, own account; and it was thereby further agreed that the defendant was not to receive any part of the profits which should arise therefrom; and it was also thereby further agreed, that the plaintiff should pay to the defendant one-half of the office rent, to take date from the 24th day of December then next, the rent of which was then 50*l.* per annum. And the plaintiff says, that theretofore and after the making of the last mentioned agreement, to wit, on the day and year last aforesaid, in consideration that the plaintiff, at the request of the defendant, then promised the defendant to perform and fulfil all things in the said first mentioned agreement contained, except so far as the same was altered by the second mentioned agreement, and all things in the second mentioned agreement contained on his part to be performed and fulfilled; the defendant then promised the plaintiff to perform and fulfil all things in the said first mentioned agreement contained, except so far as the same was altered by the second mentioned agreement, and all things in the said second mentioned agreement contained on his part to be performed and fulfilled. And the plaintiff further says that he did, after the making of the first mentioned and before the making of the second mentioned agreement, to wit, on the day and year first aforesaid, enter into the service of and become clerk to the defendant, at and upon the terms in the said first agreement mentioned, and therein continued until the making of the agreement secondly above mentioned, and from thence until the expiration of six calendar months from the date of the first mentioned agreement (which had elapsed before the commencement of this suit), he continued in the said service upon the terms in the said agreements respectively contained, except so far as the said first mentioned agreement was varied by the agreement secondly above mentioned, to wit, until the 28th day of March, in the year of our Lord 1847; and although he, the plaintiff, at the expiration of the said space of six calendar months from

the date of the said first mentioned agreement, to wit, on the day and year last aforesaid, was ready and willing, and offered to enter into such further agreement for two years, at and upon the terms hereinbefore in that behalf mentioned, and then requested the defendant to enter into such further agreement; and although no just cause was then shewn to the contrary, and although the gross profits of the baggage business, insurance agency business, and other business transacted by the defendant, at Southampton aforesaid, other than such overland agency business as the defendant was in possession of at the time of making the said second agreement, from the said 22nd day of October, in the year of our Lord 1846, up to the expiration of the said term of six months, amounted to a large sum, to wit, the sum of 500*l*.; yet the defendant, not regarding his said promise, did not nor would, when so requested as aforesaid, or at any time afterwards, enter into such further agreement as aforesaid, but on the contrary thereof, then wholly refused so to do; and the plaintiff further says, that the defendant did not nor would, though requested so to do, pay to the plaintiff 50*l*. per cent. upon the aforesaid gross profits, nor any part thereof.

The second count stated, that whereas also theretofore, and at the time of making the agreement thereafter mentioned, the plaintiff had been for the space of six calendar months, and then was in the service of the defendant as clerk, and as such clerk had conducted and was then conducting the defendant's business of a custom house and shipping agent at Southampton, thereupon, afterwards, to wit, on the 29th day of March, in the year of our Lord 1847, in consideration that the plaintiff, at the request of the defendant, would continue in the service of him, the defendant, as clerk, to conduct his, the defendant's business of a custom house and shipping agent at Southampton aforesaid, for the term of two years; he, the defendant, then promised the plaintiff to continue him in such service

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for the said term of two years, and to pay him the annual salary of 150*l*. for the first year, and 160*l*. for the second year's service, and (with the exception of such overland agency business as the defendant was then in possession of), also to pay to the plaintiff a sum of money equal to 50*l*. per cent. on the gross profits (without deduction for expenses, except when payments should have been actually made in reference to the business itself), on all baggage business, insurance agency business, and on all and every business whatsoever transacted by the defendant at Southampton aforesaid, during such term of two years as aforesaid, save and except only on such overland agency business as was then in the defendant's possession as aforesaid; and although the plaintiff, confiding in the said promise of the defendant, did continue in the service of him, the defendant, as clerk, upon the terms aforesaid, for a long space of time, to wit, until the 13th day of August, in the year of our Lord 1847, which had elapsed before the commencement of this suit, and although the plaintiff has always been ready and willing, and then offered to continue in the service of the defendant for the residue of the said term of two years, upon the terms aforesaid; yet the defendant, not regarding his said promise, did not nor would continue the plaintiff in the service of him, the defendant, as clerk, for the said term of two years, but on the contrary thereof, afterwards, to wit, on the day and year last aforesaid, and before the expiration of the said term of two years, then wholly refused so to do, and then discharged him, the plaintiff, therefrom, and hath from that time hitherto wholly neglected and refused to retain or employ the plaintiff in his said service, and by means thereof he, the plaintiff, hath lost and been deprived of all the salary, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the said service of the defendant for the residue of the said term of two years; and the plaintiff hath been and is, by means of the premises, still wholly unemployed.

Peterson. The objection was, that part of the first count and the second count were in respect of the same subject-matter. The learned Judge was right in making the order in question, as it was clear that the subject-matter of both counts was the same agreement. They were, consequently, in breach of the pleading rule of Hilary Term, 4 Wm. 4, r. 5. Where it was clear that two counts were founded on the same contract, the Courts had, without exception, interfered to strike one out. The case of *James v. Bourns (a)*, might possibly be cited as an exception to this rule, but when it was examined, it would be found to constitute no exception. The declaration there contained a count for conveying goods from Dublin to London, and a count on a promise to carry the same goods from the wharf at which they should be landed in London to the plaintiff's place of business. It would there be seen that the two counts were founded on different contracts; the one to convey the goods by sea, the other to convey them by land. In the present instance, however, there could be no distinction between the contract first alleged and the one stated in the second count.

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Lush, in support of the rule. The same strictness did not now prevail in practice as existed when the rules of pleading first came into operation, and the disposition of the Courts was rather to deal liberally with parties under such circumstances, leaving them subject to the penalty of costs attached by the rules. Thus in *Gilbert v. Hales (b)*, the declaration contained twenty-five counts. The first fifteen were on bills of exchange drawn at Paris. The next five which related to the same bills were special counts founded on the law of France, and the last five were on a special agreement to pay the bills in consideration of the plaintiff procuring their discount. The Court of Exchequer held, that the last set of counts were not in

✓ (a) 4 Bing. N. C. 420; S. C. 6 Scott, 231; 6 Dowl. 603.

✓ (b) *Ante*, vol. 2, p. 227.

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apparent violation of the pleading rules. The case of *James v. Bourne (a)*, was to the same effect.

MAULE, J. (b)—As to the two counts in *James v. Bourne*, it could not properly be said that but one contract was disclosed by them. Here, however, there may have been one only. I am of opinion that the order is correct.

CRESSWELL, J., and WILLIAMS, J., concurred.

Rule discharged.

✓(a) 4 Bing. N. C. 420; S. C. 6 Scott, 231; 6 Dowl. 603.

(b) *Wilde, C. J.*, was absent.

J. C. S. C.B. 440 PILBROW v. PILBROW'S ATMOSPHERIC RAILWAY AND CANAL
 PROPULSION COMPANY.

A declaration in covenant alleged the covenant to be by a company, to pay a certain sum to the plaintiff, as soon as conveniently could be done, out of the money raised by the first calls upon the shareholders of the company. Breach, that the money was not paid as soon as conveniently

COVENANT. The first count of the declaration stated that theretofore, to wit, on the 11th June, A.D. 1845, by a certain deed then made between the plaintiff of the one part, and the said company therein described, as registered and incorporated in pursuance of an act of Parliament, made and passed in the seventh and eighth years of the reign of her present Majesty Queen Victoria, intituled "An Act for the registration, incorporation, and regulation of Joint Stock Companies," of the other part, which said deed was then sealed with the seal of the said company, and was then signed by three of the directors of the said company, to wit, the Right Hon. Arthur Algernon, Earl of Essex, that the deed of settlement, but which was not the deed declared on, was obtained by fraud. Fourthly, that the registration and incorporation of the company recited in the deed were obtained by fraud. Eighthly, that sufficient money had not been raised to pay the plaintiff, after providing for the expenses of the company, according to the terms of the deed of settlement. Twenty-firstly, that the company was not incorporated by any charter or act of Parliament, nor duly registered according to the 7 & 8 Vict. c. 110. Twenty-secondly, that at the time of obtaining a certificate of complete registration, the company was not formed by any deed under the hands and seals of the shareholders, under the 7 & 8 Vict. c. 110: *Held*, that all the pleas were bad.

George Buckley Bolton, and Francis John Lambert; reciting that her present Majesty Queen Victoria, by letters patent under the Great Seal of the United Kingdom, bearing date the 17th of May, 1844, granted unto the plaintiff, his executors, administrators, and assigns, the sole and exclusive license, power, privilege, and authority of making, using, and vending for the term of fourteen years an invention in certain improvements in the machinery for a new method of propelling carriages on railways and common roads, and vessels on rivers and canals within England and Wales, and Berwick-upon-Tweed; and that in pursuance of a proviso contained in the said letters patent, a specification of the said invention was duly enrolled by the plaintiff in her Majesty's High Court of Chancery, on the 16th of November, 1844; and that by letters patent under the seal appointed by the treaty of union, to be kept and used in Scotland instead of the great seal thereof, bearing date the 13th of November, 1844, the like exclusive privileges in respect of the use of the said invention were granted to the said plaintiff, his executors, administrators and assigns, to be enjoyed and exercised by him and them within Scotland; and that by letters patent under the Great Seal of Ireland, bearing date the 16th of January, 1845, the like privileges, in respect of the use of the said invention, were granted to the said plaintiff, his executors, administrators and assigns, to be enjoyed and exercised by him and them within Ireland; and that in pursuance of provisoes respectively contained in the said several letters patent for Scotland and Ireland, specifications of the said inventions had been, or were intended to be, forthwith duly made and enrolled by the plaintiff; and further reciting that the said company had been duly formed under a deed of settlement, bearing date the 22nd of May, then last past; for, among other things, the working of the said several patents for the United Kingdom, and that the said company had been registered and incorporated under the provisions of the aforesaid act, and that the capital of the same consisted of 600,000*l.*, divided

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into 60,000 shares of 10*l*. each ; and further reciting that it had been agreed between the plaintiff and the said company that the plaintiff should grant to the said company a license for the exclusive use of the said several patents for the United Kingdom during the remainder of the several terms of years of such patents respectively in manner thereafter mentioned, and should also enter into such covenants as were thereafter contained for granting to the said company license to use and practise all other improvements in the invention aforesaid which should be made or invented by the plaintiff, whether the plaintiff should obtain a patent or patents for such invention or not; and that in consideration of such grant and covenant, the sum of 15,000*l*. in cash should be paid to the plaintiff so soon as conveniently could be, after the execution of these presents, out of the money raised by the first instalments or calls on the shares of the said company: It was witnessed, that in pursuance of the said agreement in that behalf, and in consideration of the premises, the plaintiff did thereby give and grant unto the said company and their successors full and free liberty, license, power, privilege, and authority to use, exercise, and put in practice the said patent invention throughout the United Kingdom of Great Britain and Ireland, during all the remainders then to come and unexpired of the respective terms of years granted by the said respective patents for England, Scotland, and Ireland, for their use and benefit. And the said company, for themselves and their successors, did thereby covenant with the plaintiff, his executors and administrators, that they, the said company, or their successors, should and would pay, or cause to be paid to the plaintiff the said purchase money of 15,000*l*. out of the money raised by the first instalments or calls on the shares of the said company as aforesaid; as by the said deed, reference being thereunto had, will, among other things, more fully appear. And the plaintiff says, that although he at all times since the making of the said deed, performed and fulfilled all things therein contained on his

part and behalf to be performed and fulfilled, and although divers instalments or calls on the shares of the said company were before the commencement of this suit, to wit, on the 1st day of July, A.D. 1845, paid to the said company, out of which the said company might and ought to have paid the said sum of 15,000*L.*, and the said company, in part performance of their said covenant, have paid to the plaintiff a small part thereof, to wit, 1000*L.*; and although a convenient and reasonable time for the payment of the residue of the said sum of 15,000*L.* since the making of the said deed, and since the payment of the said instalments or calls to the said company had elapsed before the commencement of this suit; yet the said company, not regarding their said covenant, have not paid the said residue of the sum of 15,000*L.*, or any part thereof, but have hitherto wholly refused, and still do refuse, to pay the same, or any part thereof.

Second count. That whereas also afterwards, to wit, on the 12th day of June, A.D. 1845, by certain articles of agreement in writing, then made between the plaintiff of the one part and the said company therein described, as registered and incorporated in pursuance of an act of Parliament, made and passed in the seventh and eighth years of the reign of her Majesty Queen Victoria, intituled "An Act for the registration, incorporation, and regulation of Joint Stock Companies," of the other part, which articles were then sealed with the seal of the said company, and were then signed by three of the directors of the said company, to wit, the said Earl of Essex, George Buckley Bolton, and Francis John Lambert; reciting that her present Majesty Queen Victoria, by letters patent, &c., granted unto the plaintiff, his executors, administrators, and assigns, the sole and exclusive license, power, privilege, and authority of making, using, and vending, for the term of fourteen years, an invention, &c., within England, Wales, and Berwick-upon-Tweed; and that in pursuance of a proviso contained in the said letters patent, a specification

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of the said invention was duly enrolled by the plaintiff in her Majesty's High Court of Chancery, on the 16th day of November, 1844; and that by letters patent, under, &c., bearing date, &c., the like exclusive privileges in respect of the use of the said invention were granted to the plaintiff, his executors, administrators, and assigns, to be enjoyed and exercised by him and them within Scotland; and that by letters patent the like privileges, in respect of the use of the said invention, were granted to the plaintiff, his executors, administrators, and assigns, to be enjoyed and exercised by him and them within Ireland; and that in pursuance of provisions respectively contained in the said several letters patent for Scotland and Ireland, specifications of the said inventions had been, or were intended to be, forthwith duly made and enrolled by the plaintiff; and further reciting that the said company had been duly formed under a deed of settlement, bearing date the 22nd day of May then last past, for the purchase and working of the said several patents for the United Kingdom, and any other patents which could or might be obtained for the invention aforesaid in any foreign country, place, or kingdom, and for the granting licenses for the use of all such patents at home and abroad, and that the said company had been registered and incorporated under the provisions of the aforesaid act, and that the capital of the same consisted of 600,000*L*., divided into 60,000 shares of 10*L* each; and further reciting that the plaintiff had offered to sell absolutely to the said company the said several patents for the United Kingdom, and the benefit and advantage of the same respectively, free from incumbrances, at or for the price or sum of 15,000*L* in cash, and 4,500 shares in the said company, upon each of which shares the full sum of 10*L* was to be considered as paid up, and the said company were willing to purchase such patents upon the terms aforesaid, so soon as the same could by law be effected, and an act of Parliament should have been obtained authorizing the said purchase by the company; and that in the meantime, and until such act of Parliament

could be obtained, it had been proposed that the plaintiff should grant to the said company a license for the exclusive use of the said several patents during the remainder of the several terms of years of such patents respectively, which had been done by an indenture of license, bearing date, and duly executed, the day before the date of the said agreement; and further reciting that the plaintiff and the said company were desirous of entering into such agreement, in respect of the premises, as was thereafter contained: It was witnessed that for effectuating the said desire it was thereby agreed and declared between and by the parties to those presents, and the plaintiff did for himself, his heirs, executors, and administrators (but so far only as the covenants and agreements thereafter contained were to be observed or performed by, or were applicable to the plaintiff or his heirs, executors, or administrators), thereby covenant with the said company and their successors, and the said company did for themselves and their successors (but so far only as the covenants and agreements thereafter contained were to be observed or performed by, or were applicable to them or their successors,) covenant with the plaintiff, his executors, and administrators, in manner following, that is to say, that whensoever the said company or their successors should apply for an act of Parliament to enable them to purchase and take a conveyance of the said several letters patent for the United Kingdom, then the plaintiff, his executors or administrators should and would, upon the request of the said company, or their successors, and whether such application should be made in the next session thereof, or at any time thereafter join and concur with the said company or their successors in the said application, and sign the petition for the said intended act, and testify his consent thereto, and to all such other acts or deeds for facilitating and promoting the success of such application, and assisting the said company and their successors therein, and procuring the said intended act to be passed into a law, as by the said company and their

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successors or their counsel in the law, should be advised or desired and required; and should and would immediately after the said intended act should be passed, and so soon as the same could or might lawfully be done, convey and assure the said several patents for the United Kingdom unto the said company and their successors, or at the option of the said company, the said patents might, without any further consent of the plaintiff, his executors or administrators, be vested by the said act in the said company and their successors for their absolute use and benefit; and that the sum of 15,000*l.* in cash should be paid to the plaintiff, as soon as conveniently could be done after the execution of the same, out of the money raised by the first instalments or calls on the shares in the said company; as by the said articles reference being thereunto had, will (among other things) more fully appear. Breach, that although the plaintiff hath at all times since the making of the said articles performed and fulfilled all things therein contained on his part and behalf, to be performed and fulfilled; and although the said company, within a convenient and reasonable time after the execution of the said articles of agreement, to wit, on the 1st day of September, A.D. 1845, could and might by calls and instalments on the shares of the said company, have raised the said last-mentioned sum of 15,000*l.*, and a convenient and reasonable time for raising the said money, and paying the same in cash to the plaintiff, from and after the execution of the said articles of agreement had elapsed, long before the commencement of this suit; and although the said company have in part performance of their last-mentioned covenant paid to the plaintiff a small part of the last-mentioned sum of 15,000*l.*, to wit, 1000*l.*: yet the said company, not regarding their last-mentioned covenant, have not paid the residue of the said last-mentioned sum of 15,000*l.*, or any part thereof, but have hitherto wholly refused, and still do refuse, to pay the same, or any part thereof, &c.

The defendants pleaded, third, to the first count, that

the said deed of settlement in that count mentioned and referred to was obtained by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification. Fourth, to the first count, that the registry and incorporation of the said company recited in the said deed in that count mentioned, were obtained by the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him. Verification. Eighth, to the first count, that the said company was formed by and under a certain deed of settlement in the said first count mentioned, and referred to, and that such deed of settlement bears date, to wit, the 22nd day of May, in the year of our Lord 1845, and was and is made between the several persons whose names are thereunto affixed, and one of which said persons was and is the said plaintiff of the first part; the Right Honorable Arthur Algernon, Earl of Essex, and George Buckley Bolton, of the second part; and Francis John Lambert, of the third part (profert); and that thereby, after reciting, as therein is recited, each of them the said parties, whose names and seals were thereunto respectively set and affixed, save only the parties thereto of the second part, did for himself and herself, and his and her heirs, executors, and administrators respectively, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her heirs, executors, and administrators, covenant, declare, and agree with and to the said parties thereto of the second part, as trustees on behalf of the said company, in manner expressed, among others, in the several clauses thereafter and hereinafter contained, that is to say, that a capital of 600,000*l.* be raised by the issue of 60,000 shares of 10*l.* each, that the directors might proceed and carry on the business of the said company, although all the said 60,000 shares had not been subscribed for; that to carry on the business of the company, it should be lawful for the directors, from time to time, as they might deem expedient, to make such call or calls on the shareholders for the payment of such instalment on their shares in the capital of

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the company, beyond any call or calls then already paid, as the directors should, from time to time, think necessary, until the whole thereof should be paid, and which instalment or instalments, each and every of the parties thereto, his executors and administrators, should duly pay accordingly; provided nevertheless, that no more than 1*l*. per share should be called for at any one time, and that after any calls should have been made, twenty-one days at least should elapse before any further calls should be made; that none of the shareholders in the said company should in any way interfere or intermeddle in the affairs or concerns thereof, except so far as they might be authorized so to do by virtue of the said deed of settlement; that the directors should, as soon as conveniently could be, after the complete registration of the said company, cause to be satisfied out of the funds of the said company, all the costs, charges, and demands upon the said company, for business already done on account of the said company, and which on the day of the date of the said deed of settlement should remain unsatisfied, including the costs and charges incidental to the formation of the said company, and the costs and expenses of and relating to the preparing and executing the said deed, and should also pay or cause to be paid to the plaintiff with and out of the money received from the first calls on the shares of the said company, after providing thereout a sufficiency to meet the necessary expenses of the said company, the said sum of 15,000*l*. in cash. Averment, that from the time of the execution of the said deed of settlement, hitherto no calls or instalments on the shares of the said company have been raised or paid to or received by the said company or by any persons on their account sufficient to satisfy the necessary expenses of the said company, according to the true intent and meaning of the said deed and the said sum of 15,000*l*., or any part thereof. Verification. Eighteenth plea, a similar plea to the second count. Twenty-first plea, that the said company was not incorporated by any charter or act of Parliament, nor was the same duly and lawfully registered

and incorporated according to the form of the statute in such case made and provided, and in the said deed and articles of agreement respectively mentioned, at the respective times of the making of the said deed and articles of agreement in the declaration mentioned or either of them. Verification. Twenty-second plea, that the said company was a company, requiring a certificate of complete registration within the true intent and meaning of the said act of Parliament in the declaration firstly above mentioned, and that at the time of the obtaining a certificate of complete registration by the said company, the said company was not formed by a deed or writing under the hands and seals of the shareholders therein or any of them, in pursuance of the provisions of the statute in such case made and provided, and in the said declaration firstly above mentioned, nor was there at any time any such deed of settlement of the said company as is required by the said statute. Verification. The plaintiff demurred generally to the third and fourth pleas, and specially to the eighteenth, twenty-first, and twenty-second pleas. To the eighth plea he replied *de injuriâ*, to which replication the defendants demurred specially.

F. Robinson, for the plaintiff. The third plea sought to shew that the deed on which the plaintiff declared was void, because the registration and incorporation of the company had been obtained by fraud; that, however, could afford no answer to an action on a contract subsequently entered into by the company. The same observations applied to the fourth plea. [He was stopped by the Court as to those pleas.] Next, with respect to the eighth and eighteenth pleas. There, he set up a contract alleged to have been made by the deed forming the company. The previous deed could not control the subsequent one, although the subsequent deed would control the previous one. That such a subsequent agreement would supersede the previous one was the result of the case of

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Putmore v. Colburn (a). Again, those pleas alleged that sufficient money for the stated purposes had not been raised by the calls since the execution of the deed. It was quite consistent, however, with these allegations that sufficient amount had been raised at the time that the deed was executed, and might at that moment have been available to the company. The twenty-first plea stated that the company was not incorporated by any charter or act of Parliament, nor was it duly registered according to the statute. The plea, however, did not shew that it was not a corporation at all, as, to be a good plea it ought; but merely denied incorporation by a particular mode. It was quite consistent with the allegations in the plea, that it was a foreign corporation; and then it would be recognised in this country as in the cases of *The Dutch West India Company v. Van Moses (b)*, and *The National Bank of St. Charles v. De Bernales (c)*. But it was not shewn by the plea that the company was not properly incorporated. It merely stated that the company was "not duly and lawfully registered." That was in fact a proposition of law. If it was intended to deny the incorporation by proper registration, the defendant should either have simply traversed the registration, or have shewn wherein the defect in point of fact existed. In *Hume v. Livversedge (d)*, it was held that a plea of no *proper* affidavit of debt having been filed, was bad. So in *Ransford v. Copeland (e)*, it was admitted, in argument, that a plea that certain persons were *illegally* associated, would have been bad on special demurrer. Again, in *Webb v. James (f)*, it was held, that a plea alleging that a rate could not be *legally* collected, would have been bad on special demurrer. By 7 & 8 Vict. c. 110, s. 7, a variety of steps were necessary to be taken in order to constitute a perfect

✓(a) 1 C., M. & R. 65.

Dowl. 660.

✓(b) 1 Stra. 612.

✓(c) 6 A. & E. 482; S. C. 1 N.

✓(c) Ry. & M. 190; S. C. 1 C. & P. 671.

✓(f) 7 M. & W. 279; S. C. 9

✓(d) 1 Cr. & M. 332; S. C. 1, Dowl. 314.

registration. If, therefore, the registrar were guilty of any neglect, however minute, in registering the company, the contract into which the company entered subsequently would, according to this plea, be avoided. [*Maule, J.*—So that this plea negatives that the company is absolutely perfect. According to this plea, if the registration was done in a slovenly manner, that would be sufficient to avoid the contract.] But that could not be correct, because the registrar was a public officer, and though his acts might be done irregularly, they would still be valid. Thus, in *The Company of Proprietors of the Margate Pier v. Hannam and Others* (a), it was held that the acts of a justice of the peace, who has not duly qualified are not absolutely void; and, therefore, that persons seizing goods under a distress warrant, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, were not trespassers. But the defendants were not in a situation to deny the registration and incorporation of the company, because the registration and incorporation of it were recited in the deed set forth in the declaration. They, therefore, were estopped from such a denial, as appeared by the cases of *Bowman v. Taylor* (b), and *Hill v. The Manchester and Salford Water-works* (c). The twenty-second plea denied that the company was a corporation at all. This, however, they were estopped from denying as they had been sued and had appeared as a corporation. In *Brooke's Abr.* tit. "*Corporations and Capacities*," pl. 28, certain members of the corporation of Lombards of London appeared to a præcipe which had been directed to the sheriffs, describing them as the company of Lombards, London merchants from Florence, and stated that they were distrained by the sheriffs of London to appear, and they prayed that their appearance might be recorded as the Lombards of London, in order to save their issues, but

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(a) 3 B. & A. 266.

& M. 264.

(b) 2 A. & E. 278; S. C. 4 N. ✓ (c) 2 B. & Ad. 544.

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not as the company of Lombards, &c.; but the Court would not permit this to be done, for the writ must be understood to be against the corporation. That case was an authority to shew that being sued as a corporation, they could only be permitted to appear as a corporation. Here they had appeared as a corporation, and could not, therefore, deny the fact.

Bovill, contra. The question raised by the third and fourth pleas is, whether the projector of a company can, by his own fraudulent contrivances procure a quasi corporation, and then seek to charge other persons with liabilities alleged to arise out of such corporation. The third plea shewed that the deed of settlement was void, and the 7 & 8 Vict. c. 110, s. 7, shewed that the deed of settlement was the instrument under which the funds of the company were to be raised. If, therefore, that deed was void, a subsequent deed dealing with the funds raised under the void deed, must be void also. [*Wilde*, C. J.—But the plea admits that funds have been raised.] It does not, therefore, follow that the plaintiff is to be paid out of funds improperly raised. It could not be alleged who the party was on whom the fraud was committed; at least, it could not be alleged that it was committed on the defendants, because they were not in existence at that time. [*Wilde*, C. J.—It appears that the company were parties to the fraud. *Maule*, J.—Your argument proceeds on the ground, that this deed of settlement was obtained by fraud and therefore is void; that is not so. Because a party upon whom fraud is practised may avoid the deed, the party who practises the fraud cannot therefore avoid it. Here, the company were parties to the alleged fraud.] The present contract could not differ from any other which was obtained by fraud. Then as to the eighth and eighteenth pleas. They, in effect, alleged that by the first deed, the plaintiff was to be paid out of a particular fund. The second was executed in order to carry out that intention. If that was

the object of the second deed, then there was nothing to shew that the plaintiff would be entitled to recover anything, until the expenses mentioned in the plea had been paid. [*Wilde*, C. J.—The deed on which the plaintiff has declared is a sort of guarantee that the first calls shall be sufficient. There is no objection to the parties modifying the original deed of settlement by a subsequent deed.] Next as to the twenty-first and twenty-second pleas, it was contended that the defendants were estopped from denying the existence of the company in consequence of the recital of the deed. But in order that an estoppel should operate, it must be precise. The recital was that the company had been “registered and incorporated after a deed of settlement had been executed,” &c. The plea, however, introduced the words “duly and lawfully.” The words, therefore, of the recital and the plea not being precisely the same, there was no estoppel. With respect to the argument, that there was nothing to shew that the corporation in question was not a foreign corporation, that could not avail, because the recital shewed it to be a corporation created under the 7 & 8 Vict. c. 110. [*Cresswell*, J.—But the plea professes to deny any incorporation whatsoever.] Next, with regard to the objection, that the pleas sought to put in issue matters of law in contravention of the rule in *The Abbot of Strata Marcella’s case* (a). The words “duly and lawfully” had not the effect attributed to them. By the addition of them, the allegation was no more than if it had consisted of a simple denial of the registration and incorporation. If these words were to be considered as referring matter of law to the jury, it would be difficult to frame a plea under such circumstances free from the objection. The case was similar to that of an action for the infringement of a patent, where the plea was that the specification was not “duly” enrolled; or to the case of an action on an annuity deed with the plea that the memorial was not “duly”

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✓ (a) 9 Rep. 24.

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enrolled. In both those cases, the word "duly" would not vitiate the plea. It would appear from *Muntz v. Foster* (a), which was an action for infringing a patent, that the proper form denying the enrolment of a specification was by alleging that the specification was not "duly" enrolled. There, whether the enrolment was proper or not was of course a matter of law, yet there was no objection to such a plea. It was, no doubt, a mixed question of law and fact which this plea raised, that however was no ground of objection. [*Maule, J.*—Your argument is, that because some issues in fact may involve matter of law, that therefore you may refer an issue in law to the jury. The effect of the plea is, that there was a registration, but it was not a due one. *Wilde, C. J.*—You point the traverse directly to the matter of law.] The twenty-second plea was not open to this objection, as that merely denied that at the time of obtaining the certificate of registration, the company was formed by a deed in pursuance of the provisions of the statute. But falling back upon the plaintiff's declaration, the breach alleged in the second count was bad. Raising the money by instalments to pay the 15,000*l.* was a condition precedent to the liability of the company to pay it. It could never be intended by the parties that whether the funds arising from the calls were sufficient or not, the plaintiff was to be paid; *Pontet v. The Basingstoke Canal Company* (b). There was no covenant here to raise the funds by means of the calls for the purpose of paying the plaintiff. None being expressed to that effect, none could be implied, covenants relating to the mode of payment having been introduced into the deed; *Aspdin v. Austin* (c); *Dunn v. Sayles* (d); *Gwillim v. Daniell* (e). [*Maule, J.*—In this covenant the words are "money raised," and not money "to be raised."] In policies, where the assured

✓(a) 6 M. & G. 734; S. C. 7
 Scott, N. R. 471; *Ante*, vol. 1,
 p. 737.

✓(b) 3 Bing. N. C. 433; S. C.
 4 Scott, 182.

✓(c) 5 Q. B. 671; S. C. 1 D.
 & M. 515.

✓(d) 5 Q. B. 685; S. C. 1 D.
 & M. 579.

(e) 2 C., M. & R. 61.

was to be paid out of the funds of the association, it was always necessary to aver that the association had funds. As in *Andrews v. Ellison and Others* (a), similar stipulations were introduced in deeds with companies of this nature that payment should only be made out of the funds. The deed did not even shew that powers were conferred on the company to raise the money. No breach of any covenant corresponding with the covenants in the deed was here alleged.

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F. Robinson, in reply. With respect to the argument used in support of the twenty-first and twenty-second pleas that the registration was informal, section 25 of the 7 & 8 Vict. c. 110, afforded a complete answer to it. By that section, it was provided, that on complete registration and a certificate being given by the registrar of joint stock companies, the company should be incorporated from the date of the certificate by the name of the company set forth in the deed of settlement. It might happen that the Registrar General, before the granting the certificate, had not ascertained that all the formalities of the statute had been complied with. But those defects were cured by the grant of the certificate. In such cases the rule, "quod fieri non debet, factum valeat," applied. With respect to the cases which had been cited for the purpose of shewing that the pleas did not contravene the rule of pleading which prohibits matters of law from being referred to a jury, they were clearly distinguishable from the present, as the question of law was distinctly raised by the twenty-second and twenty-third pleas. With respect to the sufficiency of the breach assigned in the second count in the declaration, there could be no doubt that it was well assigned. In cases of this sort, the intention of the parties was to be considered; and it would be found on examining the cases cited, that they depended on the particular terms of the

(a) 6 Moore, 199.

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contract into which the parties had entered. Here, it was evident that the parties intended that the plaintiff should be paid out of the funds which were at that time in the company's hands arising from the payment of calls. The cases of *Otway v. Holdips* (a); *The Duke of St. Albans v. Ellis* (b), and *Lord Shrewsbury v. Gould* (c), were authorities to shew that where the intention of the parties could be collected from the language of the instrument taken together, effect was to be given to it. In the last case, where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price for the improvement of their lands and the repair of their houses; this was held to be an implied covenant, that he would burn lime at all such seasons; and therefore that it was not a good defence to plead that there was no lime burned on the premises, out of which the lessor could be supplied. The covenant here clearly shewed a duty to pay the money out of the fund raised by the payment of calls. On that duty, the plaintiff declared, and a breach of that duty was the one assigned.

WILDE, C. J.—The objections to the declaration cannot prevail, and the pleas are bad. The second count, which is the count objected to, sets out certain articles of agreement, by which the plaintiff had undertaken to sell absolutely to the defendants certain patents, and to give them the benefit of any improvements that might be made; and it was agreed that this contract should be executed when an act of Parliament could be procured for the purpose; and that in the meantime an exclusive license to use the patents should be granted to the defendants: so that the plaintiff had parted with all his beneficial interest in the patents to the defendants. It then proceeds to set forth a covenant that the sum of 15,000*l.* should be paid to the plaintiff as soon as conveniently could be done, out of

(a) 2 Mod. 266.

✓(b) 16 East, 352.

✓(c) 2 B. & A. 487.

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money raised by the first instalment of calls upon the shareholders of the company. The question is, whether the company were absolutely bound to pay 15,000*l.*, or whether it was a covenant subject to the liability of the money being raised, and only to attach if it were raised. The words of the covenant are to pay "out of the money raised." Does that mean money to be raised, or money already raised? There are expressions used consistent with the fact of the money being actually in hand, and there is an absence of contrary expressions. No time is fixed for raising the money, and no power to raise it, shewn. If the money were to be raised at some future time, the agreement, one would expect, would shew when, and how, and by whom, it was to be raised. Probably, the plaintiff would not so readily have parted with his property, unless there had been a fund in hand out of which he might be paid. But suppose it to be otherwise, there is still no reasonable doubt of what the covenant imported. The case of *Otoay v. Holdips*, is in point. In the present case, the declaration shews an obligation to pay, with a breach that the defendants did not pay; and that breach is introduced by an allegation that "they could and might have raised the money, and that a reasonable time within which they could have done it, has elapsed." That is, again, consistent with the money having been raised at the time of making the agreement; but suppose it was not then raised, a default after a reasonable time has elapsed, is shewn, and they are liable for a breach of the obligation. Every deed must be construed with reference to the intent of the parties to be collected from the deed itself. This is a covenant to pay out of the money raised by calls, becoming an absolute covenant to pay, by neglect to raise money by calls. All the pleas but the twenty-first and twenty-second were disposed of during the argument. The answer to these two is complete. The declaration shews a recital in the deed that the company was registered and incorporated. If by the twenty-first plea a denial of the registration in fact is meant, the com-

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pany are estopped by the deed; if a denial of the fact of registration be not meant, then the words "duly and lawfully" are used to put matter of law in issue for the jury, and the plea is bad upon that ground. The cases referred to only illustrate this, that where it is intended to put a fact in issue, that may be done, although incidentally some matter of law may happen to be necessarily involved. There is the same objection to the twenty-second plea. If there were not these objections, the pleas are, at all events, very ambiguous, as it cannot be seen whether they mean to deny the facts absolutely, or to call in question some matters connected with the facts.

MAULE, J.—The declaration appears to me to be sufficient. The second count in effect states a sale by the plaintiff to the defendants of his patent right for 15,000*l*. Then comes the covenant to pay. It is insisted that there is no covenant to raise money by calls. I agree with that, and I think there is no breach of duty if the company do not make calls. The impression on my mind is, that the declaration shews a simple covenant to pay—it points out a fund out of which payment is to be made, but it is not a condition precedent that such a fund should furnish the means of payment. It is, after all, the business of the defendants to get in the instalments. Putting it, however, at the highest, it is a covenant to pay, provided the company shall be in receipt of money arising from calls. Then the case of *Otway v. Holdips (a)*, is an authority that for performance of a condition you may substitute an allegation, shewing that the parties could have performed it and would not. The twenty-first and twenty-second pleas seem to me to be unquestionably bad. They expressly or impliedly admit that the company had a certificate of registration. The act puts a certificate, upon the footing of a patent creating a corporation, confirmed by Parliament.

(a) 2 Mod. 266.

Upon a certificate issued in regular form, the company becomes an indisputable corporation. The pleas say nothing to controvert the effect of the certificate.

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CRESSWELL, J.—The point on the declaration is the simplest possible. The covenant is to pay out of money raised by calls; the breach is that they have not paid out of money raised by calls, or in any other way. Then come the words “as soon as conveniently may be;” a convenient time has surely elapsed, when they have had the opportunity to raise money and have not raised it.

WILLIAMS, J., concurred.

Judgment for the Plaintiff.

BOOZEY v. TOLKIEN.

WILLES shewed cause against a rule nisi obtained by *Byles*, Serjt., to rescind an order of *Platt*, B., by which he ordered the plaintiff to elect to strike out the third or the first and second counts contained in the declaration; and requiring the defendant to shew cause why, in the alternative, the third count should not be restored, striking out the causes of complaint, if any, common to all three counts. The three counts in question were as follows:—

First, that before and at the time of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff was, and from thence hitherto has been, and still is, the proprietor of the copyright of and in a certain book, to wit, a musical composition, called “Tutto è sciolto, e di funesto; Scena ed aria nell’ opera, La Son-nambula, del M. Bellini;” and also of the copyright of and

SC 8. CB. 476
A declaration in case for the infringement of a copyright contained three counts; the first and second founded on the 5 & 6 Vict. c. 45, and the third on the common law; the copyright being the same in all. The Court compelled the plaintiff to make his election between the two first counts and the last; as the cause of action, contained in the last count, might be given

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in a certain other book, being a musical composition, called "Tutto è gioja, tutto è festa; Cavatina nell' opera, La Sonnambula, del M. Bellini;" which said several books had been and were, and each of them had been and was first printed and published in that part of the United Kingdom of Great Britain and Ireland called England; and which said several books had been and were, and each of them had been and was first published within twenty-eight years last past; and which said copyrights, and each and every of them were subsisting at the several times of the committing by the defendant of the grievances hereinafter mentioned; yet the defendant, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the plaintiff, and to deprive him of the gains, profits, emoluments, and advantages, which he might and otherwise would have derived and acquired from his said books, and each and every of them; and also to deprive him of the benefit of his said respective copyrights therein, and each and every of them; heretofore and after the passing of a certain act of Parliament, made and passed in the session of Parliament, holden in the fifth and sixth years of the reign of her present Majesty, intituled "An Act to amend the Law of Copyright," and within twelve calendar months next before the commencement of this suit, to wit, on the first day of January, 1847, and on divers other days and times between that day and the commencement of this suit, wrongfully and injuriously, and without the consent in writing of the plaintiff, so being the proprietor of the said copyrights, and each and every of them as aforesaid, did, in a certain part of the British dominions, to wit, in that part of the United Kingdom of Great Britain and Ireland called England, unlawfully print and cause to be printed for sale, divers, to wit, 20,000 copies of each of the said books; contrary to the form of the statute in such case made and provided, &c. &c.

The second count stated, that the defendant further contriving and intending as aforesaid, heretofore, and within

twelve calendar months next before the commencement of this suit, to wit, on the several days and times aforesaid, did wrongfully and unjustly, and without the consent in writing of the plaintiff, so being the proprietor of the said copyright, and each and every of them as aforesaid, in that part of the United Kingdom of Great Britain and Ireland called England, unlawfully sell and cause to be sold, divers, to wit, 20,000 copies of each of the said books; and unlawfully publish and cause to be published, divers, to wit, 20,000 other copies of each of the said books; and unlawfully expose to sale and hire, and cause to be exposed to sale and hire, divers, to wit, 20,000 other copies of each of the said books; and unlawfully had in his possession for sale and hire, divers, to wit, 20,000 other copies of each of the said books; then on those days and times aforesaid, well knowing the said copies of each and every of them to have been unlawfully printed; contrary to the form of the said statute, &c. &c.

The third count stated, that the defendant further contriving and intending as aforesaid, heretofore, and before the commencement of this suit, to wit, on the several days and times aforesaid, did unlawfully and unjustly, and without the consent of the plaintiff, so being the proprietor of the said copyrights, and each and every of them, in that part of the United Kingdom of Great Britain and Ireland called England, unlawfully print and cause to be printed, for sale and hire, divers, to wit, 20,000 other copies of each of the said books; and unlawfully sell, divers, to wit, 20,000 other copies of each of the said books; and unlawfully publish and cause to be published, divers, to wit, 20,000 other copies of each of the said books; and unlawfully expose to sale, divers, to wit, 20,000 other copies of each of the said books. By means of the committing of which said grievances by the defendant, the plaintiff hath been and is greatly injured and damnified; and thereby the plaintiff has been hindered and prevented from selling, divers, to wit, 50,000 copies of each of his said books; and his said

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copyrights, and each and every of them have been and are greatly injured and damnified; to the plaintiff's damage of 5,000*l.*, &c.

Willes. On examining these counts, it would be perceived, that the only distinction between the two first counts and the third was, that the latter did not conclude "*contra formam statuti*." The rule of pleading, Reg. Gen., Hilary Term, 4 Wm. 4, Pt. II. r. 5, prohibited a plaintiff from having two counts upon the same subject-matter of complaint. Here, there was no difference between the subject-matter of complaint in all the three counts. The mere introduction of a conclusion "*contra formam statuti*," could not make the subject-matter of complaint different. Unless it could be said that the plaintiff set up a statutory right as distinguished from a common law right, the plaintiff had no ground of complaint which would sustain the last count.

Byles, Serjt., in support of the rule. Antecedent to the statute of the 5 & 6 Vict. c. 45, the plaintiff would be entitled to recover, if he could prove that the pirated works had been sold, but under that statute it was requisite to prove an unlawful printing of the works. The first and second counts in the present declaration were founded on the statute 5 & 6 Vict. c. 45, s. 15, but the third count was founded on the common law. The same cause of complaint could not be given in evidence therefore under the two first, and under the third counts. [He referred to *Lee v. Clarke* (a); *Wells v. Iggulden* (b), and *Fife v. Bousfield* (c)]. With respect to the objection, that a portion of the complaint contained in one count was also contained in another, that was no ground for putting the plaintiff to his election. In the case of *Vaughan v. Glenn and Another* (d), the Court of Exchequer were of opinion,

✓(a) 2 East, 333.

(b) 3 B. & C. 186; S. C. 5 D. & R. 13.

✓(c) 6 Q. B. 100; S. C. *ante*, vol. 2, p. 281.

✓(d) 5 M. & W. 577.

that although one of the counts contained a portion of the complaint to be found in another count, the plaintiff was still entitled to retain both. [*Cresswell*, J.—This distinction exists between the case last cited and the one before the Court. In that, the plaintiff disclosed two different contracts in the counts, and consequently, one count could not have been applicable to both; while here, if the plaintiff should fail on the statutable cause of complaint, he may rely on his common law right.]

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WILDE, C. J.—The Court have considered this case, and are of opinion that the decision of the learned Baron, who made the order was correct; and, therefore, that the plaintiff can only be permitted to retain the two first counts or the last count contained in the declaration. Whatever is included in the last count, he may give in evidence under the two first. The present rule must, therefore, be discharged.

Rule discharged.

COURT OF QUEEN'S BENCH.

Easter Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

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The form of a notice of trial is immaterial, if it be delivered in time, and clearly and unquestionably informs the defendant that the plaintiff intends to proceed to trial at a certain specified time.

Therefore, a notice of trial purporting to be a continuance only of a former notice, but delivered in sufficient time to be of avail, if it had been an original

notice, was held to be good as an original notice.

It is no objection to a notice of trial that it is given after the cause has been set down for trial.

THIS was a rule calling upon the plaintiff to shew cause why the trial and verdict given in the above cause, and all subsequent proceedings, should not be set aside for irregularity, with costs.

It appeared upon the affidavits, that issue was joined in the above cause on the 17th of November, 1847, and notice of trial given for the sittings after Michaelmas Term. That upon the application of the defendant to a Judge at Chambers, the trial was postponed until the sittings after Hilary Term, 1848, on condition that the defendant should bring in a certain sum of money by a certain time. He did not do so, but obtained another order for further time, but never brought in the money. On the 22nd of January, 1848, the plaintiff set the cause down for trial, but without giving any fresh notice. The cause was not reached, but

was made a remanet to the sittings in the present Easter Term, which commenced on the 17th of April. On the 8th of April, the plaintiff gave a notice of trial in the following form: "Take notice of trial in this cause for the first sitting in next Easter Term to be holden in Westminster Hall, in the county of Middlesex; the same having been made a remanet from last Hilary Term." The cause was tried as an undefended one, and a verdict returned for the plaintiff. The present rule was then obtained, on the ground that as there was no notice of trial for the sittings after Hilary Term, the notice for the sittings in Easter Term being merely a notice of continuance, was a void notice, and could not act as an original notice; and that even if it could, it was bad, as being given after the cause was set down for trial.

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Addison shewed cause. It was not thought necessary to give a notice of trial for the sittings after Hilary Term, as that time was appointed by the Judge's order (a). But even if it were necessary, the notice given on the 8th of April was good as a new notice; and the case of *Tyte v. Steventon* (b) shews that a continuance of a void notice of trial may operate as a new notice, if given within the regular time; as was the case here. Mr. Justice *Blackstone* there says, "There is no settled precise form of notice required. Sufficient, if it apprizes the defendant with certainty, that the plaintiff means to proceed to trial. It is indifferent, whether he says I renew or I continue the former notice, provided there be sufficient time according to the rules of the Court." It is said, however, that the notice of trial must be given before the cause is set down for trial, and that a notice subsequently given is invalid. But no authority can be cited in support of this position, and the practice is unquestionably the other way.

✓ (a) See *Ellis v. Trusler*, 2 W. Bl. 798. *Boyes v. Twist*, Barnes, 292; *Ranger v. Bligh*, 5 Dowl. 235;

✓(b) 2 W. Bl. 1298. See also *Fell v. Tyne*, *ibid.* p. 246.

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Pickering, in support of the rule. It is submitted that it was necessary that a notice of trial should be given for the sittings after Hilary Term, notwithstanding that that time was named in the Judge's order; *Ellis v. Trusler* (a); *Jacks v. Mayer* (b). That not being done, the notice relied on could not operate as a continuance; and, as an original notice, it was invalid, not having been given till after the cause was set down for trial. [*Coleridge, J.*—Have you any authority for the latter proposition?] No, but it is apprehended that the plaintiff has no right to enter the cause before he has given notice of trial. The marshal only receives the record on the supposition that notice of trial has been previously given; for otherwise the Court might be occupied in trying causes, the verdicts in which might afterwards be set aside for want of notice.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for setting aside a verdict for irregularity; and the ground in effect was, that the cause had been set down for trial originally, without notice of trial previously given. It was set down in Hilary Term for the last sittings, and made a remanet to the sittings in Easter Term.

In due time before those sittings, notice of trial was given, in which were inserted the words "the same (i. e. the cause) having been made a remanet;" so that it did not purport to be an original notice.

This objection was not much insisted on, nor does it appear to me of any weight. The case of *Tyte v. Steven-ton* (c) cited by Mr. *Addison*, is a satisfactory authority that the form of a notice of trial is immaterial, if it be delivered in time, and clearly and unquestionably informs the defendant that the plaintiff intends to proceed to trial at a certain specified time. There the notice, purporting to be a con-

✓(a) 2 W. Bl. 798.

herd v. Butler, 1 D. & R. 15.

✓(b) 8 T. R. 245; *S. P. Shep-*

✓(c) 2 W. Bl. 1298.

tinuance only of a former notice, was held to be good as an original notice.

But it was said that no cause can be properly set down until notice of trial of such cause has been given. No authority was cited for this: the two cases cited of *Jacks v. Mayer*, and *Ellis v. Trusler*, do not apply, nor do I find such a rule laid down anywhere in the books of practice. Certainly, in far the greater number of instances, notice of trial is in fact given before setting down, because, in far the greater number of instances, it is indorsed on the issue delivered: but this is not necessary, nor does the marshal inquire, whether notice has been given or not, before he receives the record. Looking at the principle on which notice is required, I cannot see the necessity for holding the rule so strict. I, therefore, discharge this rule, and as it was an experimental motion on the point of irregularity, with costs.

Rule discharged, with costs.

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MUTTER and Another v. FOULKES.

J. A. RUSSELL moved for a distringas to compel an appearance. The affidavit stated that the defendant was a lunatic, and that the calls had been made at the lunatic asylum, of which he was an inmate. That on one occasion the proprietor of the asylum had been seen, on another his wife, and on a third occasion his daughter; that the answer given in reply to deponent's request to see the defendant, was the same on each occasion, namely, "that it was contrary to the rules of the establishment that he could be

The defendant was a lunatic, and was confined in a lunatic asylum; and the party, going there to serve him with a writ of summons, was told, on several occasions, by the proprietor of the asylum, and by his wife and

daughter, that it was against the rules of the establishment that the lunatic could be seen. The proper number of calls were made; and, on the last occasion, a copy of the writ left with the daughter of the proprietor. The Court granted a distringas to compel an appearance, directing the writ to be served on the wife of the lunatic, or at his last place of residence, as well as at the asylum.

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seen." On the last occasion, a copy of the writ of summons was left with the daughter of the proprietor. According to the case of *Banfield v. Darell* (a), these facts would probably be sufficient to entitle the plaintiffs to a rule nisi for a distringas. In a later case, however, of *Limbert v. Hayward* (b), the Court of Exchequer granted a rule absolute for a distringas under similar circumstances; the only difference between that case and the present being, that there it appeared that the wife of the defendant was living at the defendant's house, and carrying on his business. Here that fact did not appear on the affidavit, although it is believed that it equally exists.

ERLE, J.—I see no reason why this should not be considered as a valid attempt at service. You are, therefore, entitled to the rule absolute for a distringas; but the writ must be served on his wife, or at his last place of residence, as well as at the lunatic asylum.

Rule accordingly.

✓(a) *Ante*, vol. 2, p. 4.

✓(b) 13 M. & W. 480; S. C. *ante*, vol. 2, p. 406.

REGINA v. The JUSTICES of SUFFOLK.

The words in the General Highway Act, 5 & 6 Wm. 4, c. 50, s. 85, "quarter sessions" "holden for the limit within which the said

highway" "shall lie;" mean the quarter sessions held for the "county, riding, division, shire," &c., in which the highway is situate; and not a mere adjournment thereof, held within a particular division.

Therefore, where the quarter sessions for the county were held within one division, and afterwards by adjournment within three other divisions, and on an appeal under the 88th section of the General Highway Act, the notice of appeal was given ten clear days only before the adjourned sessions at which the appeal was to be tried, and within which the highway was situate, and not ten clear days before the first holding of the sessions; and the sessions declined to hear the appeal, on the ground that the notice had not been given in time; this Court refused to grant a mandamus compelling them to enter continuances and hear the appeal.

session, to the next general quarter sessions of the peace to be held at Ipswich, in and for the said county, upon an appeal between Amos Plummer, appellant, and James Whistlecraft, James Welham, John Clarke, and Stephen Martin, the surveyors of the highways of the respective parishes of Haughley and Wetherden, in the said county, respondents, touching a certificate dated the 6th day of December last, under the hands of the Rev. William Henry Crawford, Clerk, and Robert John Russel, Esq., two of the said keepers of the peace and justices, certifying that certain footpaths in the parishes of Haughley and Wetherden aforesaid mentioned in the said certificate plan lodged with the clerk of the peace for the said county, might be stopped up as being unnecessary, and rendered useless and dangerous to the public; and notice of an intended application to the quarter sessions of the peace for the said county, held at Ipswich in the said county, on the 7th day of January last, for an order for stopping up the same: and at such next general quarter sessions of the peace, to hear and determine the application of the said Amos Plummer for the costs and expenses incurred by him in prosecuting the said appeal. Upon notice of this rule to be given to the said keepers of the peace and justices, or some of them, and also to the said surveyors, in the mean time.

The affidavit in support of the rule was made by the appellant's attorney, and stated, that a notice, dated the 5th of November, 1847, and signed by James Whistlecraft and James Welham, surveyors of Haughley, and John Clerk and Stephen Martin, surveyors of Wetherden, in the hundred of Stow, in the county of Suffolk, of an application for an order to stop up certain parts of three several footways or highways, situate in the parishes of Haughley and Wetherden, to be made on the 7th of January, 1848, to the justices of the peace assembled at quarter sessions in and for the county of Suffolk, at Ipswich, in the said county, (a copy of which notice was annexed to the affidavit), was affixed at the places and by the sides

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of each ends of certain footways and highways, situate in the parishes of Haughley and Wetherden, in the hundred of Stow, in the said county, for and during four successive weeks, namely, from the 8th of November, 1847, to the 6th of December in the same year. That a copy of the said notice was also affixed on the doors of the churches of the said parishes of Haughley and Wetherden aforesaid, on Sunday the 14th day of November last, and three following Sundays. That a like notice was inserted in a newspaper called the "Ipswich Journal;" and which newspaper is generally circulated in the said county of Suffolk, wherein the said footways and highways do lie; for four successive weeks, namely, on Saturday the 13th of November, 1847, and three following Saturdays. That on the 7th of December, 1847, a certificate under the hands of two of her Majesty's justices of the peace for the said county of Suffolk, (a copy of which certificate, dated the 6th of December, was annexed to the affidavit), that the said footways and highways were unnecessary, together with a plan of the said footways and highways, and an affidavit of John Barnes, a competent surveyor, verifying the same, were lodged with the clerk of the peace for the said county of Suffolk. That on or about the 23rd of December, 1847, one Amos Plummer, of Haughley aforesaid, tailor, instructed the deponent to appeal on his behalf against the said certificate. That the general quarter sessions of the peace for the division of the said county of Suffolk in which the said footways and highways are situate, next after the filing of the said certificate, were held at Ipswich, in the said county, on the 7th day of January, 1848. That on the 27th of December, 1847, the defendant caused to be served on each of the surveyors of the highways for the said several parishes of Haughley and Wetherden, a notice and statement of grounds of appeal against the said certificate, signed by the said Amos Plummer. That on the following day, a notice under the hand of John Marriott, the attorney for the said surveyors

of the said parishes of Haughley and Wetherden, was left at the office of the deponent. The notice, of which a copy was annexed to the affidavit, was in the following form: "Between Amos Plummer, appellant, and the surveyors of the highways of the respective parishes of Haughley and Wetherden, in Suffolk, respondents. As the attorney for and on behalf of the surveyors of the highways of the respective parishes of Haughley and Wetherden aforesaid, I hereby give you notice, that no application will be made to the next general quarter sessions to be held at Ipswich, on Friday the 7th day of January next, for an order to stop certain footpaths in Haughley and Wetherden aforesaid, and mentioned in the certificate and plan lodged with the clerk of the peace for the said county of Suffolk; but that the same is abandoned. Dated this 28th of December, 1847. John Marriott. To Amos Plummer and to Mr. James Gudgeon, his attorney." That the deponent attended at the general quarter sessions of the peace for the said county of Suffolk, holden at Ipswich aforesaid, on the 7th of January, 1848, which were the sessions at which, according to the said first mentioned notice, application was intended to be made for an order to stop up the said footways and highways, for the purpose of applying, and instructed counsel to apply, to the said Court of Quarter Sessions, for the costs and expenses incurred by the said Amos Plummer in prosecuting such appeal. That the attorney for the said surveyors also attended the said sessions, and instructed counsel to oppose such last mentioned application. That the said appeal was duly entered with the clerk of the peace for the said county, and was by him called on to be heard. That the counsel for the appellant thereupon called a witness, who proved the service of the said notice and statement of grounds of appeal on the day on which the same were respectively served as hereinbefore mentioned, when the counsel for the respondents contended that the service of the said notice and statement of grounds of appeal was insufficient, and had been made too late; and

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that the same ought to have been served ten days at the least before the day on which the general quarter sessions of the peace for the said county of Suffolk were holden at Beccles, in the same county, namely, ten days before the 3rd of January; and that it was not sufficient to serve the said notice and statement of grounds of appeal ten days at least before the day appointed for holding the said general quarter sessions of the peace at Ipswich aforesaid: upon which, after hearing the counsel for the appellant, the chairman of the said sessions stated that the Court thought that the said notice had not been served in proper time, and refused to entertain the application of the said appellant.

The affidavit in opposition to this rule was made by John Henry Borton, Esq., the clerk of the peace for the county of Suffolk, and stated that the general quarter sessions in and for the said county are holden for the said county at large, and that there are no original quarter sessions holden for any division or limit in the said county; but that the original sessions, which commence on Monday in the sessions weeks prescribed by the act of Parliament, at Beccles, are, for local convenience, held by adjournment at Woodbridge, thence by further adjournment at Ipswich, and thence by further adjournment at Bury Saint Edmunds, in the said county. That there is only one commission for the said county; and that all offences within the said county may be inquired of and tried by juries sworn for the county, and not for any division or limit of the county; although for local convenience, the precepts for summoning such juries are made out for the respective divisions at which such adjourned sessions are held. That the venue in all indictments for offences triable at the quarter sessions for the said county is, by the universal practice of the said Court, laid, and the offences therein charged are therein stated to have been committed, within the said county, and not within any division or limit of the said county. That the last January quarter sessions for the said county of

Suffolk were begun and held at Beccles, in the said county, in the first week after the twenty-eighth day of December, to wit, on Monday the third day of January last past; and that the said sessions were adjourned from thence to Woodbridge, on the fifth day of the same month of January; and that the said sessions were adjourned further from thence to Ipswich, on Friday the seventh day of the same month of January.

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Palmer and *Cadogan* on behalf of the justices (a), now shewed cause. This is an appeal against an order for stopping up a highway, and the question will turn upon the construction which is to be put upon the words "quarter sessions holden for the limit," in the general Highway Act, 5 & 6 Wm. 4, c. 50, ss. 85 and 88, by which the appeal is given. By section 5, which is the interpretation clause, it is enacted, that in the construction of the act the word "'justices' shall be understood to mean justices of the peace for the county, riding, division, shire, city, town, borough, liberty, or place in which the highway may be situate or in which the offence may be committed." The word "limit" therefore, must be taken to mean the county, riding, division, &c., in which the highway is situate. Section 84 provides the mode in which proceedings must be taken in order to stop or divert a highway. By that section, where a highway is sought to be stopped up, two justices are to proceed to view the same. By the 85th section, if certain facts shall appear to them upon such view, they are to direct the surveyor of the highways to give certain public notices, which notices having been given, and a plan of the old and new highway, verified by a competent surveyor, having been laid before them, they are "to certify under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public;

(a) No one appeared to shew cause on the part of the surveyors.

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and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary; and the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions which shall be holden for the limit within which the highway so diverted and turned, or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid), be read by the said clerk of the peace in open Court; and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be enrolled by the clerk of the peace amongst the records of the said Court of Quarter Sessions." Section 88 enacts, "that when any such certificate shall have been so given as aforesaid it shall and may be lawful for any person who may think that he would be injured or aggrieved any such highway should be ordered to be diverted and turned or stopped up," &c., "to make his complaint thereof by appeal to the justices of the peace at the said quarter sessions," &c. And section 90 enacts, "that the Court of Quarter Sessions is hereby authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not, and such costs and expenses shall be paid by the surveyor or other party as aforesaid at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been

given; and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said Court of Quarter Sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this act." It is submitted, that notice of the appeal should have been given ten days before the first day of the general quarter sessions for the county, holden at Beccles on the 3rd of January; and that as that was not done, the sessions acted rightly in dismissing the appeal. It appears upon the affidavit of the clerk of the peace for the county, that there are no original quarter sessions held for any division or limit within the county; but that the quarter sessions commence on the Monday in the sessions' weeks prescribed by the act of Parliament, at Beccles, and are thence adjourned for local convenience to Woodbridge, and from thence by further adjournment to Ipswich, and from thence by further adjournment to Bury St. Edmunds. Indeed, the question has already been decided in *Reg. v. Justices of Suffolk (a)* in this Court, where it was held, that the notice and grounds of appeal under the 4 & 5 Wm. 4, c. 76, s. 81, should be given fourteen days before the first day of the general quarter sessions, and not fourteen days before the first day on which the adjourned sessions are held for the division in which the appeal is to be tried; and the present case is even stronger than that, for there the words of the Poor Law Act are "the first day of the sessions at which such appeal is intended to be tried." The words in the 85th section, "quarter sessions holden for the limit within which the said highway" "shall lie," must refer to the quarter sessions "holden for the limit" that is holden for the jurisdiction; and not to a mere adjourned sessions. This is shewn by the form given of the certificate by the justices in the schedule to the act, No. 17, which is directed "to

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✓(a) *Ante*, vol. 4, p. 628.

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the justices of the peace at their general quarter sessions to be held at — in the said county." The only other section in which the words "holden for the limit" occurs, is the 82nd section (a). If the sessions at Ipswich were an original sessions held for that division, then the construction contended for might be correct; but as they are merely an adjournment of the sessions begun and holden at Beccles, a notice to be given before the sessions, should have been given before the sessions at Beccles. There is also another reason why the sessions were justified in refusing to hear the case. The four weeks required by the 85th section had not elapsed between the lodging the certificate of the justices, and the beginning of the next sessions at Beccles; the certificate having been lodged on the 7th of December, and the sessions commencing at Beccles on the 3rd of January. Even if it had appeared clearly on affidavit that the practice of the sessions was to consider the first day of each adjourned sessions as the first day of the sessions, so far as notices, &c. were concerned, which related to appeals to be tried at such adjourned sessions; that practice, it is submitted, could not have affected the express words of this statute (b). [They referred to *Rex v. Polstead* (c); *Rex v. Hindercleave* (d), and *Rex v. Sussex* (e)].

Couch, in support of the rule. The question is, whether the decision in *Reg. v. Justices of Suffolk* (f), upon the terms of the poor law statute is to be binding in this case in a question upon the construction of a different statute, the General Highway Act; the words used in the two statutes not being the same. It is submitted, that it ought not to be so considered, as the whole scope and object of

(a) They referred also to the language of the 45th section on this point.

(b) They also took some formal objections to the rule and affidavit, but as no judgment was

given upon these points, the argument is omitted.

✓(c) 2 Stra. 1263.

(d) 19 Vin. 356.

✓(e) 7 T. R. 107.

✓(f) *Ante*, vol. 4, p. 628.

the latter statute shew that local convenience is to be consulted in the proceedings under it. The words used in the 85th section "quarter sessions" "holden for the limit, within which the said highway" "shall lie," manifestly shew that where quarter sessions are held in different parts of the same county, the certificate should be read at those sessions which are held in that part of the county in which the highway in question is situate; and the object proposed, namely, of notoriety, would be thus more effectually accomplished. Whatever steps are to take place at a petty sessions, are by the interpretation clause, section 5, to take place at a "petty sessions held for the division or place;" and the case of *Rex v. Milverton (a)*, shews that before this act the justices had no power to stop up a road lying out of the division or hundred for which they act. Besides, here the respondents themselves had treated the sessions holden at Ipswich, as the original sessions, by giving notice of an application to the sessions there for the justices' certificate in pursuance of the 85th section. It was scarcely, therefore, competent to them to object to the sessions as not being the sessions contemplated by the 85th section.

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ERLE, J.—I am of opinion that this rule must be discharged. The question is, whether the words in the 85th section of the General Highway Act, "quarter sessions" to be "holden for the limit, within which the said highway" "shall lie," mean a different Court than the Court of Quarter Sessions, holden for the county; and I am of opinion they do not. It appears to me, that unless I could find that some other meaning was plainly intended by the Legislature in using these words, I am bound to hold that the general Court of Quarter Sessions for the county is meant, and not any adjournment thereof held within a division within which the highway may be situated. The

(a) 1 N. & P. 179; S. C. 5 A. & E. 841.

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practice of holding the Court of Quarter Sessions by adjournment in different parts of the same county has no doubt arisen since the time of legal memory, and was probably adopted for local convenience and to save expense to parties having business at sessions. It cannot, however, in any manner alter the legal constitution of those sessions, so as to constitute them original sessions for each place, or in fact in any way to alter their character from that of an adjournment of quarter sessions, begun at one place and thence adjourned to another. No authority was cited, nor am I aware that any exists, to shew that sessions "for the limit," means an adjourned sessions held at a particular place; and I think, upon looking to the interpretation clause, section 5, I must rather take those words to refer to sessions holden for a county, &c. at large, than to the mere locality in which the sessions for the county may happen to be held. At all events, I do not feel justified in putting on them the construction which is contended for in support of this rule. The rule must, therefore, be discharged, and with costs to the justices.

Rule discharged accordingly.

REGINA v. DUKE of GRAFTON and Others, Justices, &c.

An order in bastardy for the payment of expenses of the maintenance of an illegitimate child, under

the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 10, whether the defendant appears in person or by attorney, to answer the complaint of the woman before the justices, should state on the face of it, that the evidence was given "in the presence and hearing" of the defendant, or of his attorney, as the case may be; and if, *after appearance*, there is any special reason for omitting that statement, it should be suggested on the face of the order.

Where in an order drawn up on a printed form under the 8 & 9 Vict. c. 10, it was stated that the putative father appeared before the justices in pursuance of the summons; but the words "in the presence and hearing of the said," &c. (after the statement of the proof being given and the evidence received) were struck out: *Held*, on motion for a certiorari, that the order was bad, and that the Court would not presume, these words being struck out, that the proof and evidence were nevertheless received and given in the presence and hearing of the putative father, or of his attorney.

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into this Court, a certain order, made under the hands and seals of the said justices, adjudging one John Philip Bunn to be the putative father of an illegitimate child.

It appeared upon the affidavit upon which this rule was obtained, that the following order was drawn up on a printed form; and that the words "in the presence and hearing of the said" and the word "by" were erased by the clerk, who drew up the order, by drawing his pen through them:—

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Suffolk, } At a petty session of her Majesty's justices of the
to wit. } peace for the county of Suffolk, holden in and
for the division of Blackburn, in the said county, at Ixworth,
on the first day of November, in the year of our Lord one
thousand eight hundred and forty-seven, before us, the
Duke of Grafton, Edward Bridgman, Esquire, Richard
Norton Cartwright, Esquire, and the Reverend Augustus
Fitzroy, clerk, four of her Majesty's justices of the peace
for the said county.

Whereas one Mary Smith, single woman, residing at
Barningham, within this division, did, on the twentieth day
of October, in the year of our Lord one thousand eight
hundred and forty-seven, having been delivered of a bastard
child within twelve calendar months prior thereto, make ap-
plication to Edward Bridgman, Esquire, one of her Majesty's
justices of the peace acting for this division, for a summons
to be served upon one John Philip Bunn, of Hopton, in the
said county, farmer, whom she alleged to be the father of the
said child; and the said justice thereupon issued his sum-
mons to the said John Philip Bunn to appear at a petty
session to be holden on this day for this division, in which
the said justice usually acts, to answer her complaint
touching the premises. And whereas the said John Philip
Bunn, having been duly served with the said summons
within forty days from this day, and now appearing in pur-
suance thereof, and the said Mary Smith having now
applied to us, the justices, in petty session assembled, for

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an order upon the said John Philip Bunn, according to the form of the statute in such case made and provided. And it being now proved to us ~~in the presence and hearing of the said (a)~~, that the said child was, since the passing of an act passed in the eighth year of the reign of her present Majesty, intituled "An Act for the further amendment of the Laws relating to the Poor in England," that is to say, on the fourth day of September, in the year of our Lord one thousand eight hundred and forty-seven, born a bastard of the body of the said Mary Smith. And we, ~~having in the presence and hearing of the said (b)~~, heard the evidence of such woman, and such other evidence as she hath produced, and having also heard all the evidence tendered ~~by (c)~~ on behalf of the said John Philip Bunn; and the evidence of the said Mary Smith, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction; do hereby adjudge the said John Philip Bunn, to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do hereby order that the said John Philip Bunn do pay unto the said Mary Smith, the mother of the said bastard child, so long as she shall live and be of sound mind, and shall not be in any gaol or prison or under any sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of the said statute, the sum of two shillings per week, until the said child shall attain the age of thirteen years, or shall die, or the said Mary Smith shall marry: and we do hereby further order the said John Philip Bunn to pay to the said Mary Smith the sum of one pound seven shillings, being the costs incurred in obtaining this order.

Given under our hands and seals at the session aforesaid.

(Signed)

GRAFTON.

EDWARD BRIDGMAN.

AUGUSTUS FITZROY.

R. NORTON CARTWRIGHT.

(a) *Sic.*

(b) *Sic.*

(c) *Sic.*

Couch shewed cause (a). The objection raised to this order is, that it does not appear upon the face of it, that proof that the child was born a bastard was given in the presence and hearing of the putative father; nor that the evidence of the mother and the other evidence produced by her was given in his presence and hearing. The case of *Reg. v. Tordoff* (b), will probably be relied on in support of this objection; but that was a case of a conviction; and although the rules of construction respecting orders and convictions, do not differ as to the fact necessary to give jurisdiction, yet when jurisdiction is shewn in the case of the former, every intendment will be made to support them, but not of the latter; *Paley on Convictions*, p. 131, 3rd ed. Under the old law and until the passing of the 7 & 8 Vict. c. 101, it was not necessary that the putative father should be present at the examination of the woman before the justices. It was sufficient if it was proved that he had been regularly summoned, although he did not attend; *Rex v. Upton Gray* (c). Then does the statute 7 & 8 Vict. c. 101, make any alteration in this respect? It is submitted it does not. Section 3, empowers the justices to take the evidence in the absence of the putative father, on proof that he has been duly summoned. There is nothing in the statute which requires him to remain during the inquiry if he does appear, and the justices cannot detain him if he chooses to go away, which they may do in cases of conviction, where they have power to cause the party to be brought before them. It could, therefore, never be the intention of the Legislature that his absenting himself after the proceedings had commenced should deprive the magistrates of the power of going on with them. The 8 & 9 Vict. c. 10, gives a form which, if adopted, is to be held sufficient. But it does not prohibit any other form from being used. Should the Court, however, be of opinion, that it is necessary that the proof and evidence should

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(a) In Hilary Term last.

(c) Cald. 308; S. C. 1 Bott.

✓ (b) 5 Q. B. 933; S. C. 1 D. 544.
& M. 693.

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be given in the presence and hearing of the putative father, then they will intend that it was so given; *Rex v. Luffe* (a). [*Wightman*, J.—How can I intend that, when I see the form given by the act is followed, except as to the very statement that it took place in the presence and hearing of the alleged father, which is struck out?] The father may have appeared and then gone away leaving his attorney to act on his behalf; and that would seem, in point of fact, to have been the case, as instead of the word “by” which has been struck out, the words “on behalf of” have been inserted. The case of *Reg. v. Shipperbottom* (b), shews that an order so made would be good. The form given by the statute makes no provision for such a state of circumstances; and, therefore, the Court will have to decide whether an order in the present form is invalid independently of the statute.

Worlledge, in support of the rule. The distinction between the present case and the one cited of *Rex v. Upton Gray* (c), is, that here it is stated on the face of the order, that the alleged father appeared before the justices, and in the case cited it does not seem that he ever appeared at all in pursuance of the summons. [*Wightman*, J.—Suppose the putative father appears, but chooses to go away after the inquiry has commenced, what is to be the form of order then?] There may be some difficulty in such a case; but here it does not sufficiently appear that he was present when the inquiry began. [*Wightman*, J.—He was either absent because he would not stay, or because the justices refused to examine the evidence in his presence. In the latter case the order would be bad, but in the former, would it not be otherwise?] It is submitted then that it should have appeared on the face of the order, that he had withdrawn himself; *Reg. v. Shipperbottom*. The fair intendment upon this document, from the words being

(a) 8 East, 193.

(c) Cald. 308; S. C. 1 Bott.

(b) Q. B. Easter Term, 1847, 544.
 cited from 16 Law Jour. M. C. 113.

struck out, in pursuance of the note attached to them in the statute, is that he was not present at the time. The object of the statute, 7 & 8 Vict. c. 101, was to make the inquiry into these cases similar to inquiries in other cases. The justices should either have treated the case as one of non-appearance, or else have set out the real facts on the order. The word "by" being struck out, and the words "on behalf of" inserted instead, raise the presumption that the whole took place in his absence.

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Cur. adv. vult.

WIGHTMAN, J. (a)—In this case which was argued at the latter end of the last Term, the question turned upon an objection to the validity of an order in bastardy, made upon the putative father, for the payment of a weekly sum, for the maintenance of the child.

The order was made under the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 10; and was in the form given in the schedule to the last mentioned act, with certain omissions which raised the objection.

The order recited the application of the mother, and the issuing a summons to the putative father to appear and answer the complaint. It then stated that the putative father appeared in pursuance of the summons, and that the mother then applied to the justices for an order upon the putative father; and it being then proved to the justices that the said child was born a bastard, and the justices having heard the evidence of the woman, and such other evidence as she had produced, and having also heard all the evidence tendered on behalf of the putative father, and the evidence of the mother having been corroborated in some material particulars by other testimony; the justices did adjudge, &c.; and then made the order.

The objection was, that it was not stated that it was

(a) The judgment was delivered in the present Term by Coleridge, J., for Wightman, J.

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proved "in the presence and hearing" of the putative father that the child was born a bastard, or that the justices heard the evidence of the woman "in his presence and hearing." A printed form, in the terms of the schedule to the 8 & 9 Vict. c. 10, had been used for the order, and the words "in the presence and hearing of the said," were struck out.

It was contended for the putative father, that as it was stated that he appeared before the justices, it should also have been stated that the evidence and proof was "in his presence and hearing;" and that the form, given by the statute, required such statement, in case the defendant appeared.

On the other side it was said, that the statement of the putative father having appeared, did not necessarily imply that he appeared in person; for he might, if he pleased, appear by counsel or attorney: and that the order shews that the appearance of the putative father was by attorney; for in that part of the order which states that the justices heard all the evidence tendered "on behalf" of the putative father, the word "by," which is used in the printed form, is struck out, and the words "on behalf of" substituted; as directed by the note to the form in the schedule to the statute, in cases where the appearance is by counsel or attorney.

It was also said, that even if the putative father had appeared in person, he might, if he pleased, absent himself, whilst the woman and the other witnesses were examined; and *The King v. Luffe (a)*, and *The Queen v. Shipperbottom (b)*, were cited.

It seems to me, however, looking at the two statutes, and the forms in the schedule to the 8 & 9 Vict. c. 10, with the notes to those forms, that whether the defendant appears in person, or by attorney, to answer the complaint of the woman before the justices, the order ought to state, on

(a) 8 East, 193.

(b) 16 Law Jour. M. C. 113.

the face of it, that the evidence was given "in the presence and hearing" of the defendant, or of his attorney, as the case may be; and that if there is any special reason for omitting that statement, after appearance, it should be suggested on the face of the order. The ordinary rules of law require that, if the party, against whom the proceedings are taken, appears and makes no default, the witnesses against him should be examined in his presence and hearing. In the present case, no reason whatever is given for the omission of the statement, that the evidence on the part of the woman was given in the presence and hearing of the putative father, though it is stated that he appeared to answer the complaint. This view is consistent with the case of *The Queen v. Shipperbottom*, and the rule, therefore, will be absolute.

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Rule absolute.

Ex parte BADDELEY.

ALLEN, Serjt., moved (a) for a certiorari, to remove an inquisition and proceedings taken before the undersheriff of the county of Stafford, into this Court, for the purpose of being quashed.

He moved upon affidavits shewing that Mr. Baddeley, being an owner of certain lands in the parish of Stoke-upon-Trent, in the county of Stafford, (through which the North Staffordshire Railway Company proposed to carry their railway), that company served him with a notice, dated

The direction in respect of the interest of the sheriff, in the 39th section of the Lands' Clauses Consolidation Act (8 & 9 Vict. c. 18), is introduced for the protection of the party against whom the interest would operate, and he may therefore waive the protection if he so elects.

(a) In Hilary Term last.

A railway company having issued their warrant to the sheriff to summon a jury to assess compensation, under the 8 & 9 Vict. c. 18, s. 39, the undersheriff before whom the inquisition was to be taken, informed the party whose land was to be assessed, that he, the undersheriff, was a shareholder in the railway company. *Held*, that as the party did not object, but proceeded with the inquisition before the undersheriff, he must be taken to have waived any objection arising from the interest of the undersheriff under the statute.

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the 14th of October, 1847, that in pursuance of their acts, and of the Lands' Clauses Consolidation Act, they intended to issue their warrant to the sheriff of the county of Stafford, under their common seal, requiring him to summon a jury to assess the value of the said lands, and the amount due for compensation. That accordingly, the warrant was issued and an inquisition was taken before the undersheriff and a special jury of the county of Stafford, on the 20th of December, 1847, when a sum of 350*l.* was awarded by way of purchase money for the land, and 200*l.* by way of compensation for the damage arising from severance. It was stated by Mr. Baddeley's solicitor, "that on the occasion of this deponent attending at the office of Robert William Hand, gentleman, the undersheriff of the county of Stafford, to reduce the list of the special jury for the said inquisition, in a conversation he then had with the said Robert William Hand, that gentleman stated that he was then a shareholder in the said North Staffordshire Railway Company. That it was not till after the holding of the said inquisition that this deponent was aware that the circumstance of the said Robert William Hand being a shareholder in the said company, deprived him of his jurisdiction as such undersheriff in presiding at the said inquisition." Mr. Baddeley, in his affidavit, also swore that he was not aware of the undersheriff's interest till after the inquisition had taken place.

Allen, Serjt. It is submitted, that under the 39th section of the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, under which this inquisition was taken, the undersheriff had no jurisdiction to take it, being interested in the matter. The 39th section enacts, that in every case in which the question of disputed compensation shall be required to be determined by a jury, the promoters of the undertaking shall issue their warrant to the sheriff, requiring him to summon such jury; "and if such sheriff be interested in the matter in dispute, such application

shall be made to some coroner of the county in which the lands in question, or some part thereof, shall be situate; and if all the coroners of such county be so interested, such application may be made to some person having filled the office of sheriff or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute." By the 40th section, the provisions relating to a "sheriff" are applicable to a coroner or other person lawfully acting in his place. The only power being under this statute, the provisions of it ought to be strictly pursued.

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Curr. adv. vult.

ERLE, J. (a)—A motion was made for a certiorari to remove an inquisition taken before the undersheriff of the county of Stafford, on the ground that he was interested; and that, therefore, the warrant for summoning the party ought to have been sent to the coroner, under 8 & 9 Vict. c. 18, s. 39.

It appeared that the warrant was directed to the sheriff, who had no interest. The undersheriff had an interest, and acted on the warrant; but gave notice of his interest to Mr. Baddeley's attorney before any step was taken, and no objection was made, on the ground of his interest, until the verdict had been given.

I am of opinion that the direction in respect of the interest of the sheriff, was introduced for the protection of the party against whom the interest would operate; that he may waive the protection if he so elects; and that Mr. Baddeley, under the circumstances, did elect to waive the protection in this case.

There will be no rule.

Rule refused.

(a) In the Vacation after last Hilary Term.

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To a rule calling on the tenant in possession to shew cause why service of a declaration and notice in ejectment on his daughter, on the premises, should not be deemed good service, it is no answer that the notice was not read over or explained to the party served, and that the service took place at ten o'clock of the night preceding the first day of Term; unless it is sworn that the tenant was not acquainted with the nature and meaning of the proceedings before the first day of Term.

DOE dem. KENRICK and Others v. ROE.

THIS was a rule calling upon John Harper, the tenant in possession of the premises in question, to shew cause why the service of the said declaration and notice, as stated in the affidavit of J. Rowland, should not be deemed good service of the same, as if the same had been personally served on him the said J. Harper.

The affidavit of J. Rowland, a clerk of the lessor of the plaintiff's attorney, upon which the rule was obtained, stated that he had served the declaration and notice upon a daughter of the tenant in possession upon the premises at ten o'clock in the evening, on the 14th of April, who promised to give it to her father on his return home in the evening; and that he read over and explained the notice to her.

The affidavit in opposition to the rule was made by the daughter, and stated that the party serving was a boy of about fourteen years of age. She positively denied that he ever read over or explained to her the intent and meaning of the said declaration, or of the said notice, or of the said service thereof, or stated the nature thereof. There was also an affidavit by a servant who was present at the time of service, to the same effect.

Bovill shewed cause. He contended that the service was insufficient, inasmuch as it must be taken on the facts as they now stood, that the notice and declaration were not read over and explained to the daughter at the time of service. If that were so, the rule must fall to the ground, as the necessary materials for the application failed. He referred to *Adams on Ejectment*, 188, 4th ed., and *Bac. Abr. tit. "Ejectment,"* (B.) 1. He also insisted that the service was too late, being at ten o'clock at night of the day before the first day of Term.

Unthank, in support of the rule, submitted that it was not necessary, where a rule nisi was granted, that the declaration should have been read over or been explained to the party served, as if the tenant was ignorant of the nature of the proceedings, and therefore did not appear, he could shew that fact in his affidavit in answer to the rule. In *Doe d. Downes v. Roe (a)*, it would have been perfectly futile for the learned Judge to have granted a rule nisi, if the objection now raised were valid, as it was not even stated there upon the affidavit on which the application was made, that the notice had been read over or explained to the party served.

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COLERIDGE, J.—I am not aware, nor can the Master inform me, that this point has ever been raised. It is of course desirable that parties should be held to strict service in cases of ejectment, but I can see good reason why the service in this case should be held sufficient, by treating it as if it were service of a writ of summons in an ordinary action. There it is necessary to shew that it came to the knowledge of the party. Here the declaration and notice were received in time; but the tenant relies on the fact that they were not explained or read over to the daughter on whom they were served, and, therefore, that he may not have been acquainted with the nature of the proceedings before the first day of Term. As he has had the opportunity of speaking to that fact, and it is one peculiarly within his own knowledge, and he has not thought fit to do so; I am of opinion the case comes within the principle acted upon in *Doe d. Downes v. Roe*; and that, therefore, the rule must be absolute.

Rule absolute.

/(a) 4 Dowl. 565.

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On an appeal to the quarter sessions, by the putative father, against an order of maintenance, the 8 & 9 Vict. c. 10, s. 6, requires the justices, "on the trial of any such appeal," to "hear the evidence of the mother." *Held*, that the proof that notice of appeal had been given to her, was part of "the trial" of the appeal; and that, therefore, she might be called as a witness to prove that fact.

An order of maintenance under the 7 & 8 Vict. c. 101, was made at five o'clock in the afternoon of Saturday.

At ten o'clock on Monday morning, notice of appeal was served on the mother:

Held, that the notice was given in suffi-

cient time, as the twenty-four hours prescribed by the 7 & 8 Vict. c. 101, s. 4, within which notice of appeal is to be given, must be reckoned exclusive of Sunday.

The 7 & 8 Vict. c. 71, s. 2 (Criminal Justice [Middlesex] Act), enacts, that the adjourned sessions in Middlesex "shall be general sessions of the peace," and "shall have power to try and determine all appeals, and all other powers which" "belong to the general quarter sessions:" *Held*, that the jurisdiction thus given was optional only; and that the putative father was not bound to appeal to those sessions, but might wait and appeal to the general quarter sessions.

A RULE had been obtained in Hilary Term last, calling upon the justices of the peace in and for the county of Middlesex, to shew cause why a mandamus should not issue directed to them, commanding them to enter continuances, and hear the appeal of one Richard Cooke, against an order of affiliation, made on him by John Hardwicke, Esquire, sitting at the Marlborough Police Court, on the application of one Mary Ann Dickens.

It appeared upon the affidavits that the order in question was made by Mr. Hardwicke, about five o'clock on Saturday afternoon, the 2nd of October, 1847. That Cooke at that time gave the mother a verbal notice of his intention to appeal to the next sessions. That on Monday, the 4th of October, about ten o'clock in the morning, a notice in writing that Cooke intended to appeal against the order at the next general quarter sessions to be holden in and for the county of Middlesex, was served upon her; and on the 6th, another notice, also in writing, that he had entered into recognisances to prosecute the appeal. As there were not fourteen days between the making the order and the next general quarter sessions, which were held on the 11th of October, a notice was served upon her continuing the appeal till the general quarter sessions, to be held next after the October general quarter sessions. Notice of trial of the appeal was then regularly given for the Epiphany Sessions, and the appeal came on to be heard on the 14th of January, 1848. The appellant was put to prove his notice of appeal, and he proposed to call the mother herself as a

witness to prove that he had given her a verbal notice of appeal on the same day that the order was made. It was objected on her behalf, that she was not a competent witness to prove the notice of appeal, for the appellant; and the justices entertained the objection, and refused to allow her to be sworn. The appellant then tendered evidence of a written notice of appeal having been served on her, on the Monday morning at ten o'clock. To this it was objected that that notice was too late, as the Sunday was to be counted part of the twenty-four hours, within which the notice must be served. The sessions thought this objection also well founded, and refused to hear the appeal. It appeared upon the affidavits, that between the general quarter sessions held in October, 1847, and the general quarter sessions held in January, 1848, there was held a second or adjourned sessions in November, 1847, which, under the statute 7 & 8 Vict. c. 71, s. 2, had all the powers of a Court of General Quarter Sessions.

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Prendergast now shewed cause. It is submitted, that the sessions were right in the decision to which they came upon both points. The woman could not be called as a witness to prove that she had received the notice of appeal. Being a party in the proceeding, her evidence is only admissible, before the petty sessions, by virtue of the 7 & 8 Vict. c. 101, s. 3, which enacts, that "the justices in such petty sessions shall hear the evidence of such woman;" and before the quarter sessions, by virtue of the 8 & 9 Vict. c. 10, s. 6, which, after reciting that doubts have arisen "whether the said mother can be heard by the said Court of Quarter Sessions," enacts, "that on the trial of any such appeal before any Court of Quarter Sessions, the justices therein assembled, or the recorder, (as the case may be,) shall hear the evidence of the said mother, and such other evidence as she may produce, &c." The point upon which her evidence was tendered, was one precedent to "the trial" of the appeal. Her evidence is only rendered admissible "on the trial," ex

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necessitate rei; and the actual trial is not begun until those preliminary steps are taken, which render it incumbent on the Court to hear the appeal. Then as to the written notice of appeal, that was served too late. The statute 29 Car. 2, c. 7, s. 1, which prohibits any one from exercising their ordinary callings on a Sunday, and section 6, which renders the service of "any writ, process, warrant, order, judgment, or decree," on a Sunday void, do not apply to a notice of appeal like the present. There are some notices which are required to be given on a Sunday: such as notice of a poor rate, which formerly was given in the church, the next Sunday after its allowance; and now by the 7 Wm. 4 & 1 Vict. c. 45, s. 1, must be fixed to the church door on that day. In a late case in the Common Pleas, *Rawlins v. The Overseers of West Derby (a)*, the validity of acts done on a Sunday was much discussed. That was a question whether a notice required to be given by the 6 & 7 Vict. c. 18, s. 4, "on or before the 20th of July" in every year, was well given on the 20th of July, when that day fell on a Sunday; and the Court decided that it was. Mr. Justice *Maule*, in delivering judgment there says, "I know of no law that prevents these notices from being served on a Sunday. Certain things are by statute declared void if done on a Sunday: but *primâ facie* any act may be done on that day." "In the reign of Charles the Second, an act of Parliament passed providing that certain things that formerly might have been done on Sunday, should no longer be done on that day; all other things being left to the freedom of the common law." Here too the statute 7 & 8 Vict. c. 101, s. 4, does not speak of a day's notice which might possibly only apply to a *dies juridicus*, but says, "if within *twenty-four hours* after the adjudication and making of any order on the putative father as aforesaid, such putative father give notice of appeal," &c. Besides, even if the service of the notice had been in time,

✓ (a) 2 C. B. 72.

the notice of appeal should have been given for the adjourned sessions in November, 1847, and was too late in being given for the sessions in January, 1848. By the 7 & 8 Vict. c. 71, which is entitled "An Act for the better Administration of Criminal Justice in Middlesex," the holding of sessions in the county of Middlesex is regulated. By sect. 2, it is enacted, "that the second sessions, or the adjourned sessions" "shall be general sessions of the peace; and such general sessions shall have power to try and determine all appeals, and all other powers which now or shall hereafter belong to the general quarter sessions." By the 7 & 8 Vict. c. 101, s. 4, the putative father is bound "to appeal to the general quarter sessions of the peace to be holden after the period of fourteen days next after the making of the said order, for the county, city, borough, or place, for which such petty session may have been held." He ought, therefore, to have appealed to the November sessions, which, as regarded appeals, was the same as a general quarter sessions; and he was too late in going to the Epiphany Sessions, which therefore had no jurisdiction to entertain the appeal. [*Erle, J.*—It seems to me clear that under the terms of the statute 7 & 8 Vict. c. 71, s. 2, the November sessions had jurisdiction to hear the appeal, if the appellant had chosen to go there; but that it was not obligatory on him to do so; and that the power of appeal to the general quarter sessions was not taken away, if he preferred to wait and go there.]

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Pashley, in support of the rule, was desired to confine himself to the two first objections. The words of the act, 8 & 9 Vict. c. 10, s. 6, are very general, that "doubts have been raised as to whether the said mother can *be heard* by the said Court of Quarter Session;" and, therefore, enacts, "that on the trial of any such appeal before any Court of Quarter Sessions, the justices therein assembled or the recorder, (as the case may be,) shall hear the evidence of the said mother," &c. "and proceed to hear

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and determine the said appeal in other respects according to law." It has been said, however, that "on the trial," does not mean until after the notice of appeal has been proved, and the inquiry on the merits gone into. The question, therefore, is, when does "the trial" begin within the meaning of the act of Parliament. In *Reg. v. Stamper* (a), a rule of sessions required that all applications for orders of maintenance in bastardy should be entered with the clerk of the peace on or before a certain day, and that they should be called on at the sessions in the order of entry. The prosecutors entered the application, but did not appear at the sessions when it was called on, although the party did against whom they applied. And it was held, that the sessions had power to make an order for costs incurred "by resisting such application," under the 4 & 5 Wm. 4, c. 76, s. 73, which empowers them to do so, "if upon the hearing of such application," they shall not think fit to make any order thereon. And in a later case of *Reg. v. The Recorder of Exeter* (b), where an application had been made by parish officers for an order of maintenance, under the 2 & 3 Vict. c. 85, it being objected at the quarter sessions, that they were not the proper parties to apply, and the sessions deciding that objection to be well founded, it was held, on motion for a mandamus, that the sessions had power under the 4 & 5 Wm. 4, c. 76, s. 73, to award costs to be paid by the parish officers. [*Erle, J.*—There is a still later case of *Reg. v. Lord Hastings* (c), in which I was engaged when at the Bar, where the question arose upon a successful objection to an application under the same statute, on the ground that there was no sufficient evidence of the notice of application being signed by a majority of the guardians; and this Court held that there had been no "hearing of the application" within the 4 & 5 Wm. 4, c. 76, s. 73, so as to bind the justices to award costs.] That case seems to have been decided, according to Mr.

✓(a) 1 Q. B. 119; S. C. 4 P.
 & D. 539.

(b) 5 Q. B. 342.
 ✓(c) 6 Q. B. 141.

Justice *Wightman's* judgment, partly on the ground that the party seeking to treat the application as having been heard, was the party who objected to the parish officers being heard. As to the other point, it is submitted that it would have been unlawful to serve this notice on a Sunday (under stat. 29 Car. 2); and if that be clearly so, the Sunday should be excluded in the computation of the twenty-four hours within which the notice of appeal is required to be given in this case; and, therefore, the notice which was given on the Monday morning, was perfectly in time. "Process" is defined in *Tomlin's Law Dict.*, tit. "*Process*," as being "largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end." [*Erle, J.*—Is not the act of the Court necessary to constitute "process," not merely the act of the party?] Any statutory notice which has the legal incident of either bringing him on whom it is served into a Court of justice, or of entitling such Court to proceed and decide against him in his absence, must be considered as "process" within the meaning of the statute of Charles 2. Still more clearly is it such process, when, as in this case, the notice is in effect to remove a judgment from the judicial tribunal which has pronounced it, to a Court of appeal. In *Waldegrave's case* (a) the question was, whether the delivery of a declaration in trespass on Trinity Sunday was good, and Chief Justice *Holt* seems to have been strongly of opinion that it was not, and he is reported to have said that "he would take the word *process* for *proceeding*, and such construction as tends to a better observation is to be made." And in *Taylor's case* (b) the question was, whether service of a declaration in ejectment was good. "And *per Cur.*" it is not; for it is a process, though not a judicial one; for it is

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(a) 12 Mod. 606; S. C. *div. rem.* 1 Ld. Raym. 705. remarked that the cases reported in the twelfth volume, were of

(b) 12 Mod. 667. *Prendergast* doubtful authority.

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compulsive on the party to appear; and it may as well be said that service of a summons in a real action may be good on Sunday." In *Morgan v. Johnson* (a) it was held, that service of a notice of declaration on a Sunday is bad, though the defendant accept it, knowing it to be irregular. In *Roberts v. Monkhouse* (b), service of notice of a plea filed was held void. There Lord *Ellenborough* said, "all notices on which rules are made, are process in respect to the subject-matter; not, indeed, process with respect to the writ, but process in respect to the rule." In *Hughes v. Budd* (c), notice to produce, served on a Sunday, was held void. The case which has been cited, on the other side, of *Rawlins v. The Overseers of West Derby* (d), was not a case of a proceeding in any trial in a Court of justice. [He referred also to *Brookes v. Warren* (e); *M'Illeham v. Smith* (f); *Taylor v. Phillips* (g); *Dakin's case* (h); *Field v. Park* (i), and *Hawk. Pleas of the Crown*, bk. 2, c. 10, s. 9.] Moreover, independently of the Statute of Charles, and according to my Lord *Coke*, merchandizing on the Lord's Day is unlawful; 2 *Inst.* 220. It might probably be successfully contended, that according to the principles of the common law, such service of process on a Sunday would be void. [He was then stopped by the Court.]

ERLE, J.—I am of opinion that this rule must be made absolute. The statute 8 & 9 Vict. c. 10, s. 6, has rendered the mother a competent witness "on the trial" of the appeal; and it appears to me, that as soon as the appeal is entered, and the case called on, "the trial" commences. It would otherwise follow, that a witness called to prove that notice of appeal was given, would not be liable, if swearing

- ✓ (a) 1 H. Bl. 628.
- ✓ (b) 8 East, 547.
- ✓ (c) 8 Dowl. 316, 7.
- (d) 2 C. B. 72.
- ✓ (e) 2 W. Bl. 1273.

- (f) 8 T. R. 86.
- (g) 3 East, 155.
- (h) 2 Wms. Saund. 290, 1.
- (i) 20 Johnston's Rep. 140, (American).

falsely, to an indictment for perjury. It seems to me, therefore, that the appeal once opened, the mother was as much a competent witness to prove that she had received notice of the appeal, as she was to prove any other fact. Assuming, then, that she could have proved that notice of appeal had been given to her, which is not indeed denied on the affidavits, she ought to have been received as a witness, and the rule for the mandamus should therefore be absolute.

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As respects giving the notice of appeal on the Sunday, it seems to me that the case comes within the operation of the Statute of Charles; and that the notice is very much in the nature of "process." The service of a declaration in ejectment is strongly analogous, for that is an act done between the parties, and without any interference on the part of the Court. A notice of appeal is a notice of what one Court has decided, and which authorizes another Court to proceed. On either ground, therefore, I think this rule must be absolute.

Rule absolute.

TASSIE v. KENNEDY.

THIS was a rule calling upon the plaintiff to shew cause why he should not give security for costs within four days; or why in default thereof, the defendant should not be at liberty to take out of Court the sum of 164*l.* 2*s.* 6*d.* which had been paid in by the defendant in lieu of bail.

It appeared from the affidavits, that the action had been commenced in the Lord Mayor's Court by attachment issued on the 4th of June, 1846. That it was removed by certiorari into this Court, and that instead of putting in

A cause was removed by certiorari from the Court of the Lord Mayor of London. The defendant paid a sum of money into Court, in lieu of bail, and shortly afterwards obtained a rule for security for costs on the ground

that the plaintiff resided out of England. The security for costs was never given, and a period of nearly two years elapsed without any proceeding in the cause. The Court, under these circumstances, made absolute a rule calling on the plaintiff to give security for costs within a fortnight; otherwise the defendant to be at liberty to take the money paid in, in lieu of bail, out of Court.

24. L. 9. 928-193 (24)

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bail, as security to answer the debt and costs, as is usual in such cases, the defendant, by a Judge's order of the 19th of June, 1846, obtained leave to pay the amount, 164*l.* 2*s.* 6*d.* into Court, in lieu of bail. On the 4th of July, the defendant obtained a rule calling upon the plaintiff to give security for costs, on the ground that he resided in Scotland, with a stay of proceedings until it was given. It appeared that since that time no security for costs had been given by the plaintiff, nor any step taken by him in the cause. The present rule having been then obtained,

Bovill shewed cause. The present motion is without authority. It is laid down in 2 *Chit. Archb.* 1236, 8th ed., that "the Court will not appoint any fixed time within which the security for costs shall be given by the plaintiff." And in *Kelly v. Brown* (a) it was held, that the Court would not superadd to a rule for security for costs, the term that the defendant should be at liberty to sign judgment as in case of a nonsuit, if the security should not be given within a limited time. Does the fact, then, that here the defendant has lodged money in the hands of the Court in lieu of bail, make any difference? It is submitted that it does not. If the defendant chose to lodge money in Court, instead of putting in bail in the usual manner, it was done for his accommodation, and he must submit to any inconvenience arising therefrom.

Meymott, in support of the rule. The inconvenience which the defendant suffers is from the plaintiff's delay. It would be very hard if the defendant is either to abandon his rule for security for costs, or else to submit to his money being locked up in Court for as long as the plaintiff likes to delay proceeding in the action. If no rule had been obtained for security of costs, and bail had been regularly put in, the plaintiff would have been bound to declare

✓ (a) 5 Dowl. 264.

within two Terms; otherwise he might have been non-prossed, and the bail would have been discharged; *Sykes v. Bauwens* (a).

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Cur. adv. vult.

COLERIDGE, J.—The circumstances of this case were shortly as follow:—An action was commenced in the Lord Mayor's Court about two years ago, and shortly afterwards removed into this Court by writ of certiorari. The defendant paid a sum of money into Court, in lieu of putting in bail to answer the debt and costs. Subsequently a rule was obtained by him for security for costs, the plaintiff residing in Scotland; and the cause has remained ever since in that state. The plaintiff not having complied with this order, the proceedings are stayed: but the defendant's money is locked up; and he seeks now either to compel the plaintiff at once to give the security for costs, or to be allowed to have his money returned to him out of Court.

There is no doubt that in the ordinary case of a defendant obtaining a rule for security for costs, he cannot compel the plaintiff to proceed; and that if he wishes to do so, he must abandon his rule for security for costs. But here there is the amount which the defendant has paid in lieu of bail, awaiting the event of the cause; and it certainly seems hard upon him that he should have his money thus locked up, and yet not be able to compel the plaintiff to go on. I can find no authority which should prevent my granting the rule which the defendant asks for, and, as I think the application a reasonable one, the rule must be absolute.

Rule absolute: security for costs to be given within a fortnight; otherwise, the defendant to be allowed to take the money paid out of Court.

✓ (a) 2 New Rep. 404.

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CORBALL v. FOULKES.

Where an incorrect copy of a writ of summons was served as if tested on a Sunday, but the writ itself was regular: *Held*, that the defendant was not bound to treat the proceeding as a mere nullity, although the plaintiff had taken no subsequent steps; but might come to the Court to set the copy and service aside.

THIS was a rule calling upon the plaintiff to shew cause why the copy of the writ of summons, and service thereof, should not be set aside for irregularity, with costs.

It appeared that the writ of summons was regular, but the copy served was dated on a day different to that on which the writ was dated; and, by the wrong date, it appeared to be tested on a Sunday.

Scott shewed cause. It is submitted that the copy served is a mere nullity, and as the plaintiff has taken no subsequent step, the defendant should have disregarded the service, and ought not to have come and put the plaintiff to the costs of this rule. The rule should therefore be absolute without costs. [He referred to *Roberts v. Spurr* (a); *Hanson v. Shackleton* (b)].

Miller, in support of the rule. The defendant was bound to make this application, or he would have been said to have waived it. The defect here is an irregularity merely, and not a nullity. The writ itself was regular, and it is the copy only which is defective.

COLERIDGE, J.—The defect here can hardly be said to render the proceeding so null and void that the defendant was not bound to take any notice of it. The service would have been good, but for the defect in the copy of the writ of summons; and if the copy had been a true copy, the writ would have been null. I, therefore, think that the defendant was justified in coming here to set it aside.

Rule absolute.

(a) 3 Dowl. 551.

✓(b) 4 Dowl. 48.

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M'GREGOR v. FISKIN.

MONTAGUE SMITH moved for a rule calling on the sheriffs of London, and the plaintiff, to shew cause why the defendant should not be discharged out of the custody of the sheriffs of London.

It appeared that on the 15th of April, the defendant had been arrested under a *capias* issued on a Judge's order, under the 1 & 2 Vict. c. 110, s. 3, upon affidavits which shewed that the defendant was indebted to the plaintiff in a sum of 295*l.* 1*s.* 8*d.*; that the defendant's settled place of residence was at Glasgow, in the kingdom of Scotland, and that he was only temporarily absent from that place, and was then in England; and that he had stated in the hearing of the deponent, that he intended leaving this country for Glasgow on the evening of the 15th of April; and that, to the best of deponent's belief, he would quit England, if not immediately apprehended.

The affidavits in support of the present motion shewed that when the defendant was arrested, he told the party arresting him that he had been made a bankrupt in Scotland, and that he had a protection from arrest from the Bankruptcy Court there, which he produced, and which was in the following form:—

Unto the Honorable the Sheriff of Lanarkshire or his substitute:

The petition of James Fiskin and Robert Clark, two of the partners of James Fiskin and Company, Silk Mercers and Woollen Drapers in Glasgow, with the concurrence of James Gourlay, accountant in Glasgow, appointed trustee at the meeting of the creditors of the said James Fiskin and Company, and James Fiskin and Robert Clark, held

that country: *Held*, on motion to discharge him out of custody, that a *capias* so issued was not a "warrant of arrest" "in *meditatione fugæ*" within that section, and that the defendant was therefore entitled to his discharge.

The Scotch Bankrupt Act, 2 & 3 Vict. c. 41, s. 18, enacts, that a warrant of protection granted to a bankrupt under that act, "shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt," &c., "but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ*, or *ad factum præstandum*, or for any criminal act." A defendant having a warrant of protection under this statute, was arrested in England on a *capias* issued under the 1 & 2 Vict. c. 110, s. 3, on an affidavit that he resided in Scotland, and was about to quit England to return to

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on this the twenty-fourth day of November, 1847, humbly sheweth ;

That the estates of the said James Fiskin and Company, and James Fiskin and Robert Clark, were sequestered on the twenty-fifth day of October, 1847, under the statute 2 & 3 Vict. cap. 41, intituled, "An Act for regulating the Sequestration of the Estates of Bankrupts in Scotland."

That at a meeting of the creditors on the said estates held this day, for the election of trustee and commissioners, it was unanimously resolved to renew the personal protection of the said James Fiskin and Robert Clark, for the period of six months from the date of the said meeting, viz., the twenty-fourth day of November, 1847.

May it therefore please your Lordship, on considering this petition, to renew the personal protections granted to the said James Fiskin and Robert Clark, for the period of six months from the date of the said meeting, being the twenty-fourth day of November, 1847, or do otherwise as to your Lordship may seem proper.

According to justice, &c.

(Signed) J. CLARK.

(ENDORSEMENT).

Having considered the foregoing petition, and seen the minutes of meeting of creditors therein referred to, grants a renewal warrant of protection in favour of the bankrupts, James Fiskin and Robert Clark, against arrest or imprisonment for civil debt, for the period of six months from this date, in terms of the statute.

Glasgow, }
 24th Nov. 1847. }

HENRY GLASSFORD BELL.

There was an affidavit also by one of the town clerks of Glasgow, that the warrant of protection was according to the form of such writ as used in Scotland ; and that the name "Henry Glassford Bell" thereunto subscribed, is the proper handwriting of Henry Glassford Bell, sheriff sub-

stitute of the lower ward of Lanarkshire, who is the proper officer to subscribe the same in the terms of the stat. 2 & 3 Vict. c. 41. And that according to the best of deponent's information, knowledge and belief, the said warrant of protection is effectual for the protection of the person of the defendant from arrest or imprisonment for civil debt, contracted previous to the date and issuing of the sequestration therein referred to, throughout Great Britain and Ireland, and her Majesty's other dominions, for the term of six months from the 24th day of November, 1847, as in the said warrant of protection is mentioned.

The defendant, notwithstanding this protection, having been arrested; an application was made to Mr. Justice *Coleridge* at Chambers, to discharge him out of custody, on the 17th of April; and by him referred to the Court. The present rule was now accordingly moved for.

Montague Smith. The question in this case is, whether the defendant is not entitled to protection from arrest under the 2 & 3 Vict. c. 41, ss. 18 and 58. The 13th section empowers the Lord Ordinary to grant a warrant for the protection of the debtor from arrest or imprisonment for civil debt, until the meeting of the creditors for the election of trustee. The 17th section empowers him, where the debtor is in prison, to grant a warrant for his liberation. The 18th section enacts, "that the warrant granting protection or liberation, or a copy thereof certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt contracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in meditatione fugæ or ad factum præstandum, or for any criminal act." Then by section 58, the majority in number and value of the creditors present at the meetings of the creditors "may resolve that the personal protection of the

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bankrupt ought to be renewed for such time as they may think fit, and in such case the trustee shall apply to the sheriff, who shall renew the protection; and the deliverance by him renewing the same, or an extract thereof signed by the sheriff clerk, shall have the same effect as the original warrant of protection." Here the defendant has obtained a renewal order for his protection from arrest, which protects him from arrest or imprisonment in Great Britain and Ireland, for debts contracted previous to the date of the sequestration, except in the case of "a warrant of arrest or imprisonment in meditatione fugæ;" and the question is, whether a *capias* to arrest a defendant on the ground that he is going out of England into Scotland, can be deemed to be a "warrant of arrest or imprisonment in meditatione fugæ," and it is submitted that it cannot be so considered. In a late case of *Jones v. Anstruther*, in the Court of Exchequer in last Term (a), the defendant was discharged out of custody, having a protection under this act; but there the arrest was under a writ of *ca. sa.* The "fuga" referred to in the section is a "fuga" from the jurisdiction of the Scotch Court of Bankruptcy. How then can it be contended to include process, the effect of which is to hinder the debtor from returning within their jurisdiction? It is apprehended that the words do not include any process to prevent flight from any jurisdiction; but only such process as prevents flight from the jurisdiction of the Scotch Bankruptcy Court. The words "warrant in meditatione fugæ" describe a well known writ in the Scotch Courts.

Willes, on behalf of the plaintiff, shewed cause in the first instance. The only question in this case is one that turns upon the construction of the words, in the 18th section of 2 & 3 Vict. c. 41, "in meditatione fugæ." In a case of *M'Gregor v. Fiskin*, where the same party

(a) Since reported, 1 Exch. 367. /

was plaintiff, and the nephew of the present defendant, defendant, the same question arose before Mr. Baron *Parke* at Chambers; and there the plaintiff alleged that the defendant was about to proceed to Toronto, in Canada, which the defendant denied, but admitted he was going to Scotland; and that learned Judge refused to discharge the defendant. It is submitted, that the policy of the statute will be construed to be the same as that which regulates the insolvent law in England; and by the 5 & 6 Vict. c. 116, s. 2, it is expressly provided, that the protection granted to an insolvent debtor is not to extend to protect him from arrest under a Judge's order, on the ground that he is about to quit the country. A discharge under this bankrupt act in Scotland could scarcely be intended to have a greater effect than a discharge under the insolvent acts in England. The act was no doubt drawn by a Scotch lawyer, who used those terms with which he was probably most familiar, and which would include every species of evasion. If it is said that there is a particular and well known process signified by these words "in meditatione fugæ," that fact should have been shewn by the affidavits on which this application is rested. If Great Britain and Ireland are to be read together, then the words "and her Majesty's other dominions" must also be read with them; and under this construction a bankrupt might proceed to the Ionian Islands, or to the remotest colony in her Majesty's dominions. He might proceed to Ireland, and from thence abroad. [*Wightman, J.*—Suppose, in the present case, it had appeared that he was going back to Scotland to attend an examination. Could it be said that that was a "fuga" within the meaning of the act of Parliament?] The statute contemplated this freedom from arrest upon any process, except process of a particular description, and the writ here comes within that description.

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WIGHTMAN, J.—It seems to me very strange to consider it a "fuga" where he is going back to the very jurisdiction

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which has granted him the protection. I will, however, inquire of my Brother *Parke* respecting the case which he is stated to have decided between nearly the same parties on this point.

His Lordship then retired to consult with Mr. Baron *Parke*, and on his return,

Montague Smith was proceeding to reply, but was stopped by the Court.

WIGHTMAN, J.—I have seen my Brother *Parke*, and he tells me that he declined to interfere in the case alluded to, on the ground that it was shewn that the defendant was going to Canada.

It appears to me that the rule to discharge the defendant out of custody in this case must be made absolute; and that the “fuga” that is alleged on the affidavits in this case, is not such a “fuga” as is contemplated by the act of Parliament. I may observe, that the act of Parliament under which this question arises, is subsequent to that under which the power to arrest is given, on the ground of the defendant’s being about to leave the country; and that, therefore, if any inconsistency arose in the construction to be put on these statutes, the later statute must prevail over the former; but I do not think that any inconsistency does arise. Now, the later statute says, “that the warrant granting protection or liberation,” &c., “shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty’s other dominions,” &c.; but that it “shall not be of any effect against the execution of a warrant of arrest or imprisonment in meditatione fugæ,” &c. It therefore contemplates a protection in Great Britain and Ireland, unless there shall be a meditatione fugæ. I do not think it is necessary to consider the words “and her Majesty’s other dominions,” but shall treat it as if only containing the words “Great Britain and

Ireland." Now, is a return from England to Scotland a "fuga" contemplated by the act of Parliament. I think it is not. Going from Great Britain to Ireland could scarcely be so termed, much less going from England to Scotland. The rule will, therefore, be absolute, but the defendant must undertake not to bring an action.

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Rule absolute.

Ex parte The LONDON, BRIGHTON, and SOUTH COAST
RAILWAY COMPANY.

W*ALLINGER* moved for a certiorari to the justices of the county of Surrey, to remove into this Court an order of the Court of Quarter Sessions of that county, made on the 4th of January, 1848, in order that the same might be quashed.

It appeared that a poor rate having been made for the parish of Croydon, by which the company were assessed in respect of their property within that parish, they had duly entered an appeal against the same, which stood respited until the Epiphany Sessions, 1848. That on the first day of those sessions, they gave notice to the respondents of their intention to abandon the appeal. They did not appear at the sessions, but the respondents did; and the sessions made the following order, dismissing the appeal:—

Surrey, to wit. At the general quarter sessions of the

An appeal having been called on at the sessions, and the appellants not appearing, (having served a notice of abandonment of the appeal upon the respondents), the sessions, at the instance of the respondents, made an order in the following form:—
"Surrey, to wit. At the general quarter sessions of the peace of our Sovereign Lady the Queen, holden at St. Mary, Newington, on Tuesday," &c.

After reciting, that "at the last general quarter sessions of the peace holden in and for the county of Surrey, appeal was then made unto this Court," &c., and that it was respited "until the next general quarter sessions of the peace to be holden in and for the said county of Surrey:" "Now," &c., "it is ordered by this Court," &c. that the appeal be dismissed, and "it is further ordered, that the said appellants do forthwith pay to the said respondents, the sum of 115*l.* costs."

Held, on motion for a certiorari, that it was not necessary that notice should have been given to the appellants that more than nominal costs would be applied for; although it was stated upon affidavit that it was the practice at the sessions not to give more, unless under very particular circumstances.

Held also, that it sufficiently appeared to be a quarter sessions holden "in and for" the county.

Held also, that it was sufficiently shewn that the costs awarded, were costs in respect of the appeal.

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peace of our Sovereign Lady the Queen, holden at Saint Mary, Newington, on Tuesday, the 4th day of January, one thousand eight hundred and forty-eight.

Whereas at the last general quarter sessions of the peace holden in and for the the county of Surrey, appeal was then made unto this Court by and on behalf of the London, Brighton, and South Coast Railway Company, against a rate or assessment made for the relief of the poor of the parish of Croydon, in the county of Surrey, intituled "A rate or assessment made the 26th day of June, 1847, by the churchwardens and overseers of the poor of the parish of Croydon, in the county of Surrey, upon all and every the lessor or lessors, owner or owners, occupier or occupiers, of all and singular houses, cottages, lands, woods, tithes, tenements, and other rateable hereditaments, within the said parish of Croydon, for and towards the immediate and necessary relief of the poor of the said parish, and for the other purposes chargeable thereon according to law, at and after the rate of one shilling in the pound, rental, and pursuant to and in accordance with, and under, and by virtue of the provisions of, an act of Parliament made and passed in the sixth year of the reign of King George the Fourth, intituled 'An Act for the better assessing and collecting the Poor and other Parochial Rates in the Parish of Croydon, in the said County of Surrey;'" which said rate or assessment was consented unto and allowed by Samuel Hayhurst Lucas and John William Sutherland, Esquires, two of her Majesty's justices of the peace in and for the said county of Surrey, on the 26th day of the same month of June, 1847, and by which said rate or assessment the said appellants apprehended themselves aggrieved, But, forasmuch as the said appellants were not then ready with their witnesses to have the merits of the said appeal fully heard and determined, but desired that the benefit thereof might be saved to them, and respited until the next general quarter sessions of the peace to be holden in and for the said county of Surrey, the same was respited

accordingly. Now, upon hearing counsel on behalf of the said respondents, and the appellants being called and not appearing, it is ordered by this Court, that the appeal of the said appellants be, and the same is hereby dismissed. And it is further ordered, that the said appellants do forthwith pay to the said respondents the sum of one hundred and fifteen pounds, costs.

By the Court.

RICHARD ONSLOW,
Deputy Clerk of the Peace.

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That the appellants were unaware of any order being made respecting costs, until a copy of the above order was served upon them; and that if they had received any notice to that effect, they would have attended the taxation. That it was not the practice of that sessions to award any costs above 40s., except under very particular circumstances; and that the sum above awarded was far above the amount of any costs which had been or could be properly incurred by the respondents in and about the said appeal.

Wallinger (a). This order is bad as awarding costs contrary to the practice of the sessions, and behind the

(a) He, in the first instance, called the attention of the Court to the Local Act, 6 Geo. 4, c. 76, under which landlords are rateable for certain classes of property; and submitted that sect. 17, which enacts "that no rate or rates, assessment or assessments," &c., nor "any other matter or thing to be done or transacted in or relating to the execution of the act, or in pursuance or by virtue thereof," shall "be removed by certiorari," did not apply to the present case; as the railway company did not appeal as landlords, but

as owners and occupiers only; and referred to *Res v. Saunders* (5 D. & R. 611), as shewing that the mere entitling of the rate would not take away the common law right to a certiorari.

Mr. Justice *Coleridge* said he should not stop the case on that point; but intimated that he rather thought, that as a rate was an entire thing, and part of the present one was under this act, if bad for one part, it would be bad altogether; and, therefore, that the clause taking away the certiorari would apply.

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back of the appellants, who had no notice to attend the taxation. In *Reg. v. Mortlock* (a), where an order of sessions was upheld dismissing an appeal with costs, Lord Denman, C. J., said, "I think the order of sessions is good; it was made in the presence of the parties, and they must have understood that the costs were to be taxed by the officer of the Court. I agree that, if this had been done behind their backs, they would not have been bound by it, but not if they had notice and opportunity to attend, which I think they had." [Coleridge, J.—That was the case of an indictment for disobeying an order. Here you are asking for a certiorari. The appellants knew that by not appearing at the sessions to support the appeal, it would be dismissed, and that disposing of the appeal would involve the question of costs.] Here it appears upon affidavit that it was contrary to the practice of the sessions, which distinguishes the case from *Reg. v. Bolton* (b). [Coleridge, J.—Does your affidavit shew that it is the practice to give notice where more than 40s. is awarded?] It does not shew that fact. The order is also deficient in point of form. It does not state that the sessions are holden "in and for the county of Surrey." [Coleridge, J.—It shews that it was made at a Court of Quarter Sessions in Surrey, and it recites that "at the last general quarter sessions of the peace holden in and for the county of Surrey, appeal was made unto *this* Court," and that it was respited "until the next general quarter sessions of the peace to be holden in and for the said county of Surrey;" and then states that "it is ordered by *this* Court, &c." I think this sufficiently shews that it was the Court of Quarter Sessions for the county.] It should shew what costs are intended, and connect them with the appeal. If the doctrine of intendment is introduced, it would equally apply if the word "costs" was left out.

(a) 2 New Sess. Cas. 108.

✓(b) 1 Q. B. 66; S. C. 4 P. & D. 679.

COLERIDGE, J.—I think there is nothing in the objection. It can be seen on the face of this order that the Court of Quarter Sessions was dealing with a matter within their jurisdiction. The order must be reasonably interpreted, and if any intendment is to be made, it will be rather to support than to invalidate the order. The word “costs” has a definite meaning. The sessions give their decision on the appeal, and incident thereto is the right to give costs, which they profess to give. It seems to me that it would be trifling with words to say, that by the word “costs” they mean some other costs than those of the appeal. This objection therefore also fails.

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Rule refused.

BLAKE v. NEWBURN.

A RULE had been obtained in Hilary Term last, calling upon the sheriff of Cheshire to shew cause why he should not refund to the defendant the excess beyond the fees, to which he was legally entitled, upon the levy under the writ of fi. fa. in this cause; and also upon William Lawton, the officer of the said sheriff, to shew cause why a writ of attachment should not issue against him for his contempt in demanding and receiving from the said defendant such excess, contrary to the statute in that case made and provided; and why the said sheriff, or the said William Lawton, should not pay the costs of this application.

The affidavit of the defendant, on which this rule was obtained, stated, that a writ of fieri facias in the above cause was issued to the sheriff of Cheshire, directed to levy 36*l.* 8*s.* and interest, besides officers' fees, and other legal

Where a sheriff's officer takes more than the fees allowed under 7 Wm. 4 & 1 Vict. c. 55, for executing a writ, the rule may call upon the sheriff to shew cause why he should not return the excess, as well as upon his officer to shew cause why a writ of attachment should not issue against him, for his contempt in receiving the excess.

Where the excess complained of was charging for remaining in possession a longer time than was necessary, and for more men than were necessary to keep possession, and the affidavits were contradictory; the Court referred the matter to the Master for his report.

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incidental expenses. That the said sheriff, by William Lawton of Liverpool, in the county of Lancaster, his officer, on the 29th day of November, 1847, seized this deponent's goods and chattels in and about his dwelling-house, and kept possession of them, not at this deponent's request, (although he did not find any fault therewith), for the space of thirty-four days, until the 1st of January, 1848, during all which time one man only, and no more, was in possession, except an additional man, on two or three several occasions, for only a very short time each, and without any necessity, as the said officer's substitute continued in such possession. That during the whole of such time, the said officer's substitute was lodged at this deponent's said dwelling-house, and was there provided with all necessary victuals by him this deponent. That this deponent's landlord gave notice to the said plaintiff and his officer of rent being in arrear for the said dwelling-house. That on the 1st day of January, the defendant paid the debt and costs to the officer, amounting to the sum of 57*l.* 17*s.* 2*d.*, being 21*l.* 9*s.* 2*d.* beyond the said sum of 36*l.* 8*s.* so endorsed on the said writ; and that in the said sum of 57*l.* 17*s.* 2*d.*, the officers claimed in particular the sum of 15*l.* for having retained possession of the said goods and chattels for the space of thirty-four days as aforesaid; and 2*l.* 2*s.* alleged fees or charges by reason of the said arrear of rent, for which notice only was given on behalf of this deponent's landlord as aforesaid, and also 4*s.* 8*d.* for discharges and postages.

The affidavit in answer shewed that the sheriff's officers had remained in possession for that length of time, at the request of the defendant. That from certain circumstances which were set forth in the affidavit,—namely, that tricks had been had resort to in order to get the men out of possession, and that the property was scattered over the premises,—it was necessary for the security of the property seized, that two men should be in possession; and the affidavit denied most positively that the men were found with all necessary victuals during their stay on the premises; but admitted that, on one or two occasions, bread and cheese and beer had

been furnished them by the defendant, by way of gratuity, as it was said.

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W. H. Watson now shewed cause. The affidavit on which this rule was moved is completely answered. There is a preliminary objection to the rule which is improperly framed. It ought not to be against the sheriff to refund the excess, and also for an attachment against the officer for the contempt in taking the excess. This is combining the old form of rule against the sheriff, with the remedy given by stat. 7 Wm. 4 & 1 Vict. c. 55, s. 3, against the officer. If the officer has been guilty of extortion, and it is sought to punish him for it, the proceeding should be against him alone. The defendant may have the civil remedy against the sheriff, or the criminal proceeding against the officer; but not both. There must be a wilful contravention of the terms of the act of Parliament. Upon the facts as they appear, the question is, can the Court see that the officer has been guilty of any contempt in taking these fees. It is submitted that they cannot, and that at most it was an error in judgment on the part of the officer, who clearly thought that he was justified in taking them.

Cowling in support of the rule. The affidavit of the officer has not completely answered the case. The Court cannot see that two men were necessary for keeping possession, or that the time was not unnecessarily long, or that the charge of two guineas for the distress was proper. As to the form of the rule, it is good, but may be modified if the Court think fit. It is the general form of rule now used. An additional remedy is now given by the third sect. of 7 Wm. 4 & 1 Vict. c. 55, and the execution debtor is entitled not only to recover back the excess, but to punish the extortion. It is not necessary that there should be wilful extortion. The mere taking more than the prescribed fees is sufficient to bring the offence within the statute, and to make it a contempt.

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COLERIDGE, J.—I see no difficulty in this form of rule. Formerly the practice was to call upon the sheriff alone to refund the excess; but now by the late statute the officer also may be called upon, to answer for his contempt, in taking more than the fees authorized by law. I see no objection to both applications being joined in one rule.

As to the facts of this case, there seems some doubt whether the possession was necessarily held for so many days; whether it was held at the request of the defendant for any, and what, part of that time; and whether it was necessary to employ two men. It is said that it was necessary on account of tricks practised to get the bailiffs out of possession, and on account of the scattered nature of the property. Upon these points, and also upon the nature of the charge of the two guineas, let the matters be referred to the Master for his report; and the rule be enlarged in the mean time.

Rule accordingly (*a*).

(*a*) The rule was drawn up in the following form :—“ Upon reading, &c., and upon hearing, &c., it is ordered that it be referred to one of the Masters of the Court to ascertain whether it was necessary for the said sheriff to hold possession of the property of the defendant under the writ of execution herein for the space of thirty-four days; or whether it was at the request of the

defendant; and, if not at his request, for how long it was necessary: also whether two men were necessary for the purpose of holding possession under the said execution; and also under what circumstances the charge of two guineas was made: and that the said Master report thereon to this Court; and that, in the meantime the said rule be enlarged.



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COLLETT v. CURLING.

THIS was a rule to set aside a writ of inquiry, and all subsequent proceedings, for irregularity.

It appeared, that the writ of inquiry (the action being personal, and commenced by writ of summons) had been tested in Vacation.

A writ of inquiry, in a personal action, may be tested in Vacation, under the 2 Wm. 4, c. 39, ss. 11 and 12.

Geo. Atkinson shewed cause. The irregularity alleged to exist is, that the writ of inquiry has been tested in Vacation. Before the Uniformity of Process Act (2 Wm. 4, c. 39) it could not be tested in Vacation; but section 11 expressly authorizes it by the words "all necessary proceedings to judgment and execution," "without delay," "whether in Term or Vacation" (a). Since then, it has

(a) 2 Wm. 4, c. 39, s. 11. "And whereas, according to the present practice, in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any Term, until the beginning of the ensuing Term, whereby an unnecessary delay is sometimes created; for remedy thereof be it enacted, that if any writ of summons, capias, or detainer issued by authority of this act shall be served or executed on any day, whether in Term or Vacation, all necessary proceedings to judgment and execution may, except as herein-after provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in Term or Vacation: provided al-

ways, that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter day, then and in every such case the Wednesday after Easter day shall be considered as the last of such eight days: provided also, that if such writ shall be served or executed on any day between the tenth day of August and the twenty-fourth day of October in any year, special bail may be put in by the defendant in bailable process, or appearance entered, either by the defendant or the plaintiff, on process not

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been the uniform practice to test the writ of inquiry, in actions within that statute, on the day on which it is issued, whether in Term or in Vacation; 2 *Chit. Archb. Pract.* 707, 7th ed. In *Seaton v. Heap* (a), it was certainly held, that a writ of scire facias could not be tested out of Term; but whether that was the continuation of the old suit, or the commencement of a new one, or what was its nature, does not appear. Even assuming it to have been issued with a view to execution, it was submitted it was not a "necessary proceeding to judgment and execution" within the meaning of the Uniformity of Process Act.

Fitzpatrick, in support of the rule. The writ should have been tested in Term. A writ of subpoena might equally be termed a "necessary proceeding to judgment and execution;" and yet it has been held in the case of *Edgell v. Curling* (b), that it cannot be tested in Vacation. *Seaton v. Heap* is also an authority; as a scire facias is, in some cases, a "necessary proceeding to judgment and execution."

bailable, at the expiration of such eight days: provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said tenth day of August and twenty-fourth day of October."

Sect. 12. "That every writ issued by authority of this act shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice, or Lord Chief Baron of the Court from which the same shall issue, or, in case of a vacancy of such office, then in the name of a senior puisne Judge of the said Court, and shall be indorsed with the name and place of abode of the attorney actually suing out the

same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be."

✓ (a) 5 Dowl. 247.

(b) *Ante*, vol. 2, p. 600; S. C. 7 M. & G. 958; 8 Scott, N. R. 663.

COLERIDGE, J.—I really have no doubt at all upon this point. The question is, whether a writ of inquiry after a judgment by default in an action commenced by writ of summons, is a “necessary proceeding to judgment and execution,” within the 11th section of the Uniformity of Process Act; and I think that it is. If so, it may “be had” “without delay, at the expiration of eight days from the service of execution” of the writ of summons, “on whatever day the last of such days may happen to fall, whether in Term or Vacation.” And by section 12, every writ, issued by authority of this act, is to bear date “on the day on which the same shall be issued.” The case that has been cited of *Edgell v. Curling* differs from the present one; for there the writ of subpcena, although material, is not a “proceeding to judgment and execution” in the cause.

The writ of inquiry, therefore, is properly tested, and the rule must, consequently, be discharged.

Rule discharged, with costs.

REGINA v. HENRY BROOME and JOHN BROOME.

THIS was a rule, calling upon the defendants to shew cause why the writ of error obtained by the defendants should not be quashed, and why their recognizances should not be forfeited.

The defendants had been found guilty of a misdemeanor at the Oxford Spring Assizes, 1847; and, in the Easter Term following, had sued out a writ of error, and been admitted to bail under the 8 & 9 Vict. c. 68. The affidavit,

proceeding, has been had, or taken, by or on behalf of the said defendants, to prosecute the same: “Held sufficient, without stating that the defendants had not assigned errors, or that the defendants had been ruled to assign errors.”

It is not necessary, in order to proceed under the 8 & 9 Vict. c. 68, s. 5, to quash a writ of error for delay, that the defendants should have been previously ruled to assign errors.

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An affidavit, in support of a motion under the 8 & 9 Vict. c. 68, s. 5, to quash a writ of error for wilful delay, stated, that since the issuing and filing of the writ of error, “no process, or other pro-

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in support of the present motion, did not state that the defendants had been ruled to assign errors, or that they had not, in point of fact, assigned errors. It merely alleged that since the issuing and filing the writ of error, "no process, or other proceeding, has been had, or taken by or on behalf of the said defendants to prosecute the same."

Butt, on behalf of John Broome, shewed cause. The affidavit, upon which this rule has been obtained, is insufficient. It should have shewn positively that the defendants had not assigned errors. It should also have shewn that the defendants had been ruled to assign errors.

Phillimore, in support of the rule. It sufficiently appears by the statement in the affidavit that the defendants have not, in point of fact, assigned errors; and for the purposes of this application, it is not necessary to be shewn that they were ruled to do so. The application is made under the 8 & 9 Vict. c. 68, s. 5 (a), which empowers the Court, on motion, to order the writ of error to be quashed, if they shall decide "that the defendant or defendants by whom it shall be brought, has or have wilfully delayed or neglected to prosecute the same with effect."

Cur. adv. vult.

COLERIDGE, J.—This was a rule, calling on the defendants to shew cause why the writ of error obtained by them should not be quashed, and why their recognizances should not be estreated; on the ground that they had wilfully delayed and neglected to prosecute the same with effect,

(a) 8 & 9 Vict. c. 68, s. 5. the same with effect, it shall be lawful for such Court to order the writ of error to be quashed, and thereupon the defendant or defendants who brought such writ of error shall be liable to execution upon the judgment."

"That if the Court in which any such writ of error shall be pending shall upon motion in that behalf decide that the defendant or defendants by whom it shall be brought has or have wilfully delayed or neglected to prosecute

under the 8 & 9 Vict. c. 68, s. 5. The defendants made no affidavit in answer, but relied on the insufficiency of the affidavit on which the motion was rested, particularly on the fact that it did not state affirmatively that the defendants had not assigned errors, and that it did not state that they had been ruled to assign them. It seems to me that the affidavit, although in general terms, is sufficient to call on the other side for an answer. It says, "that no process or other proceeding has been had or taken by or on behalf of the said defendants to prosecute the same;" and I think that is sufficient. Then it was said, that the defendants should have been ruled to assign errors, as was necessary by the old practice; and the question is, whether that is necessary under the new statute. The act says, that "if upon motion the Court shall decide that the defendant," &c., by whom the writ of error shall be brought, "has" "wilfully delayed or neglected to prosecute the same with effect;" then "it shall be lawful for such Court to order the writ of error to be quashed." It seems to me, therefore, that the words of the act are so general, that it is only necessary that the Court should see there has been "wilful delay" to enable it to interfere. It seems to me that the present case comes within the general words of the act, and that it is sufficiently clear here that there has been wilful delay on the part of the defendants to prosecute the writ of error with effect. The rule must, therefore, be absolute.

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Rule absolute.

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FORD v. BEECH.

(In the Exchequer Chamber.)

J C. -11-23-382.

To a declaration in assumpsit against the defendant as maker of a promissory note, the defendant pleaded, that after the making of the note, and after it became due, it was agreed between the plaintiff, the defendant, and one A. B., that the said A. B. should, at the request of the plaintiff, pay to the plaintiff in trust for E. B., the sum of 200*l.* for her own sole use, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid, to be paid quarterly; and that the rights and causes of action of the plaintiff upon and in respect of the said note should be suspended, so long as he, the said A. B., should continue to pay the said sum of 6*l.* 5*s.* every quarter. Averment, that A. B. had duly paid the annual sum of 25*l.* quarterly. Replication, traversing the allegation of payments alleged to have been made by the said A. B., of the annual sum of 25*l.* After verdict for the defendant on this issue, and judgment of the Court of Queen's Bench in his favour: *Held*, on error in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the plea was bad; as the agreement, although it might properly be the subject of a cross action, was yet no bar to the present action.

W RIT of error to reverse a judgment of the Court of Queen's Bench.

The declaration was in assumpsit and contained four counts. The first count was upon a promissory note, dated the 28th day of May, 1839, made by the defendant for the sum of 140*l.* and interest, payable to the plaintiff twelve months after date. The second count was also on a promissory note, made by the defendant for the sum of 200*l.*, payable with interest to the plaintiff, two years after date (a).

The defendant pleaded, amongst other pleas, to both the first and second counts (b), that after the making of the notes in those counts respectively mentioned, and after the second note respectively became due, and before the commencement of this suit, it was agreed between the plaintiff, the defendant, and one Alfred Beech, that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of 200*l.* for her own sole use and benefit, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid; which sum of

(a) It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment was given upon them for the defendant, and no question arose in respect of that judgment.

(b) The defendant also pleaded to the first count that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and a verdict found upon them for the plaintiff.

25*l*. should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended, so long as he the said Alfred Beech should continue to pay the said sum of 6*l*. 5*s*. every quarter; the payments to commence as therein set forth. The plea proceeded to aver that the said Alfred Beech duly paid the annual sum of 25*l*. quarterly, according to the agreement.

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The plaintiff, in his replication to this plea, traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of 25*l*.

A verdict was found for the defendant upon the issue joined upon that traverse, and judgment was given by the Court of Queen's Bench upon the verdict so found.

The present writ of error was brought upon the ground, that non obstante veredicto upon the matters in the plea, judgment ought to have been given for the plaintiff upon both the first and second counts (*a*).

Pashley, for the plaintiff, in error (*b*).

Unthank (with whom was *Cross*) for the defendant in error.

The following cases and authorities were referred to in the course of the argument. *Peytoe's case* (*c*); *Bolton v. The Bishop of Carlisle* (*d*); *Com. Dig.* tit. "Accord," (B. 4.); *Case v. Barber* (*e*); *James v. David* (*f*); *Kearslake v. Morgan* (*g*); 2 *Wms. Saund.* 47 *gg*, 103 *b*, and 150 *n*. (2), 6th ed.; *Williams on Executors*, 1035, 3rd ed.; *Freakley v.*

(*a*) The above statement of the pleadings, &c., is taken from the judgment of the Court.

(*b*) In Michaelmas Term, 1847. *Coram, Wilde, C. J., Parke, B., Alderson, B., Maule, J., Cresswell,*

J., Platt, B., and Williams, J.

(*c*) 9 Rep. 77 *b*.

(*d*) 2 H. Bl. 259.

(*e*) Sir T. Jones, 158.

(*f*) 5 T. R. 141.

(*g*) Ibid. 513.

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Fox (a); *Stadman v. Gooch* (b); *Good v. Cheesman* (c); *Simon v. Lloyd* (d); *Allies v. Probyn* (e); *Thimbleby v. Barron* (f); *The Sheffield Railway Company v. Woodcock* (g); *Davis v. Gyde* (h); *Tatlock v. Smith* (i); *Stracy v. The Bank of England* (k); *Tremeere v. Morrison* (l); *Bayley v. Homan* (m); *James v. Williams* (n); *Baker v. Walker* (o); *Price v. Price* (p); *Fearne v. Cochrane* (q); *Snook v. Mattock* (r); *Harris v. Reynolds* (s); *Hyde v. Watts* (t).

Cur. ado. vult.

WILDE, C. J. afterwards (u) delivered the judgment of the Court.

[After stating the pleadings, &c., as above given.] The plaintiff has brought his writ of error praying for a reversal of the judgment; and upon the argument before us, his counsel has contended, that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted upon the argument before us, that the agreement

(a) 9 B. & C. 130; S. C. 4 M. & R. 18.

(b) 1 Esp. 4.

(c) 2 B. & Ad. 328.

(d) 2 Cr., M. & R. 187; S. C. 3 Dowl. 813.

(e) 2 Cr., M. & R. 408; S. C. 4 Dowl. 153.

(f) 3 M. & W. 210.

(g) 7 M. & W. 574.

(h) 2 A. & E. 623; S. C. 4 N. & M. 462.

(i) 6 Bing. 339; S. C. 3 M. & P. 676.

(k) 6 Bing. 754; S. C. 4 M. & P. 639.

(l) 1 Bing. N. C. 89; S. C. 4 M. & Scott, 603.

(m) 3 Bing. N. C. 915; S. C. 5 Scott, 94.

(n) 13 M. & W. 828; S. C. *ante*, vol. 2, p. 713.

(o) 14 M. & W. 465; S. C. *ante*, vol. 3, p. 46.

(p) 16 M. & W. 232; S. C. *ante*, vol. 4, p. 537.

(q) 4 C. B. 274; S. C. *ante*, vol. 4, p. 797.

(r) 5 A. & E. 239; S. C. 6 N. & M. 783.

(s) 7 Q. B. 71.

(t) 12 M. & W. 254; S. C. *ante*, vol. 1, p. 479.

(u) In the Vacation after Hilary Term, 1848.

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does not in point of law operate as a suspension of the plaintiff's right of action, or power to sue for the recovery of the notes mentioned in the first and second counts of the declaration; and that the plea which sets up the agreement in bar of the present action is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages, by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us, that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and that such agreement has therefore been well pleaded in bar.

The question for the decision of the Court is, therefore, what is the legal effect of the agreement between the parties set forth in the plea; that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes, so long as A. B. shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages, in the event of his suing, contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied, namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and that greater regard is to be had to the clear intent of the parties, than to any particular word which they may have used in the expression of their intent; and applying this rule, the question is, what sense and meaning must be given to the word "suspended" used by the parties. It is quite clear, that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly, and for ever, and in all events, extinguishing the plaintiff's claim and demand upon the notes; or, in other words, that it should operate as a release of the money due

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upon them. This is plain, from the words which import that the plaintiff might sue upon the notes, when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well established principle of law, that the right to bring a personal action once existing, and, by act of the party, suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said, in *Plowden*, p. 36, "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge for ever;" and in *Lord North v. Butts (a)*, it is said, "A thing personal, or action personal suspended for an hour, is extinct and gone for ever, when it is by the act and consent of the party himself who has the thing suspended;" and in *Plowden*, p. 184, it is said, "A personal action once suspended by the act or agreement of the party is always extinct, and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text books of authority, and recognised and applied throughout a long course of decisions; and in *Cheetham v. Ward (b)*, it is said by *Eyre*, L. C. J., that the principle is now acknowledged, "that where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue, until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes and an extinction of the debt. It follows, that the giving such meaning and effect to the word "suspended" used in the agreement would be contrary to the intention of the parties; and it is a well

✓(a) 2 Dyer, 139, b, 140, a.

✓(b) 1 B. & P. 630.

approved rule of law, that where parties have used language, which admits of two constructions, one contrary to the apparent general intent, and the other consistent with it, the law assumes the latter to be the true construction.

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A few authorities will suffice in support of this principle. In commenting upon *Littleton*, s. 560, where *Littleton* says, "If there be lord and tenant, and the tenant grant the tenements to a man for life, with remainder to another in fee, and the lord grant his service to the tenant for life in fee, the services are in suspense during his life, but the heirs of the tenant for life shall have the services after his decease." Lord *Coke*, in p. 313 *b*, says, "It is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant, to the prejudice of any, or against the meaning of the parties, as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disinherited of the rent; and therefore, *Littleton* here saith that the heirs of the grantee shall have the seignorie after his death." In the present case, if the agreement operates as a release, by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release. And in *Co. Lit.* 264 *b*, it is said, "A release in law shall be expounded more favourable according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself."

The general rules of law, for the construction of instruments, are clearly laid down by *Willes*, L. C. J., in *Parkhurst v. Smith* (a), and which are to the effect, that greater regard is to be had to the intention, than to the precise words; and this rule is said to have the authority of *Little-*

(a) *Willes*, 327.

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ton, Flouden, Coke, Hobart, and Finch. This principle is recognised and adopted by *Gibbs*, L. C. J., in *Hutton v. Eyre* (a), and it is also stated and applied by *Dallas*, L. C. J., and various authorities referred to in *Solly v. Forbes* (b); wherein he states as the result of modern authority, that the Courts look rather to the intention of the parties than to the strict letter, not suffering the latter to defeat the former; and he observes, that "if a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute, so to construe it as to give effect to the intent," regard being had to the entire deed; and he remarks upon the fallacy of assuming that wherever the word "release" is made use of, it must operate absolutely and unconditionally, though followed by words of qualification.

Applying the rules of construction before referred to, to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was not to suspend his right of action in the meantime, but to subject him to an action for damages, in the event of his suing, contrary to his agreement.

The general doctrine of suspension of personal actions, appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books, being where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue; as to which the

(a) 1 Marsh. 603.

✓ (b) 2 B. & B. 38.

authorities are numerous. See *Co. Lit.* 264, *b.*, also *Hargrave and Butler's Notes*; *Woodward v. Lord Darcy* (a); *Nedham's case* (b); *Dorchester v. Webb* (c); *Wankford v. Wankford* (d); *Freakly v. Fox* (e); *Williams on Executors*, p. 1035, 3rd ed.; 2 *Wms. Saund.* 47, *gg.*

The only case, in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence, a release or extinguishment of the right of action, is where the covenant or promise not to sue is general not to sue at any time; in such cases, in order to avoid circuitry of action, the covenant may be pleaded in bar as a release, for the reason assigned in *Smith v. Mapleback* (e); that the damages to be recovered in an action brought for suing contrary to the covenant, would be equal to the debt or sum to be recovered in the action agreed to be forborne. Accordingly, in *Deux v. Jefferies* (f), in debt on obligation, where the defendant pleaded that the plaintiff covenanted that he would not sue before Michaelmas, it was resolved upon demurrer for the plaintiff, for that "it is only a covenant, and shall not inure as a release. And it is not to be pleaded in bar, but the party is put to his writ of covenant, if sued before the time. But if it had been a covenant that he would not sue it at all, there peradventure it might inure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." There are other authorities to the like effect.

The agreement in the present case, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have greater effect; and in the modern case of *Thimbleby v. Barron* (g), it was held, that a covenant not to sue for a limited time for a simple contract debt, could not be pleaded in bar to an action for

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(a) Plowd. 184.

✓(b) 8 Rep. 135.

✓(c) Cro. Car. 372.

✓(d) 1 Salk. 299.

(e) 1 T. R. 441.

✓(f) Cro. Eliz. 352.

✓(g) 3 M. & W. 210.

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such debt. In that case the plaintiff had covenanted that he would not, before the expiration of ten years, demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord *Abinger*, C. B., said, "The breach of the agreement to forbear suing, renders the party liable in damages, but it is not pleadable in bar;" and *Parke*, B., said, "The books are full of authorities against the defendant," and referred to *Ayliffe v. Scrimpsire* (a); and judgment was accordingly given for the plaintiff. In 1 *Roll. Abr.* p. 939, (L.) 2, it is said, that "if the obligee covenant not to sue the obligor before such a day, and if he do, that the obligor shall plead this as an acquittance; and that the obligation shall be void and of none effect; this is a suspension of the debt, and by consequence a release." It must be observed, that in this case it was expressly covenanted, that in the event of the covenantor suing upon the obligation contrary to his covenant, that the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which by consequence was a release. The covenant in that case, therefore, went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross action to recover damages to the extent of the injury sustained by the defendant by the plaintiff's suing in breach of the agreement, no injustice is done to the defendant. Nor is such a construction inconsistent with the class of authorities in which matters have been allowed to be pleaded in bar, in order to avoid circuity of action; because such decisions

(a) Carth. 63; S. C. 1 Show. 46.

are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions; *Smith v. Mapleback* (a); which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payments, can in no view be assumed to be equal to the plaintiff's demand.

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Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security, payable in future for and on account of an antecedent demand, cannot, until after such negotiable security has become due and been dishonoured, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favour of the law merchant. The case of *Stracy v. The Bank of England* (b), was cited on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment; but upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer upon request, of certain stock, to which the plaintiff was entitled; the defendant insisted that the plaintiff had, for a good consideration, agreed not to make such a request until he had himself done certain acts; and alleged that the plaintiff, contrary to his agreement, made the request, for the non compliance with which he brought his action, before he had done those acts. The defendants,

✓ (a) 1 T. R. 441.

✓ (b) 6 Bing. 754.

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therefore, contended that such non compliance was no breach of duty on their part. There was no right of action suspended by the agreement, as it is clear from the case that no request had ever been made to the Bank to transfer the stock, and no means had ever been given to enable the Bank to do so; no name of a transferee having been given at the time when the agreement was made, nor for a long time afterwards; consequently, the only right of action the plaintiff ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendant to make the transfer until after he had done the acts mentioned in the agreement; and although the expression of suspending an action was used perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of the stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent with an undoubted principle of law, and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it, in favour of the defendant, must be reversed, and a judgment entered for the plaintiff, non obstante veredicto.

Judgment reversed.

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A RULE had been obtained in Hilary Term last, calling upon the plaintiff to shew cause why the judgment for the plaintiff should not be entered for the amount of the verdict only, without costs; or why a suggestion should not be entered on the roll, pursuant to the statute 9 & 10 Vict. c. 95, to deprive the plaintiff of costs; and that, in the meantime, proceedings be stayed.

The affidavit of the defendant upon which the above rule was obtained, stated that the above action was brought on the 26th of October, 1847, by the plaintiff as indorsee, against the defendant as acceptor, of a bill of exchange, drawn by one John William Dando upon the defendant, for payment of 12*l*. That the plaintiff, on the trial of the cause on the 25th of November, 1847, recovered a verdict for the said sum of 12*l*., and 1*s*. for interest, and no more. That the defendant, at the time of the commencement of this suit, resided and dwelt, and still does reside and dwell, at No. 2, Rahere Street, Goswell Road, in the county of Middlesex, to which place the said bill is directed to him; and that the plaintiff, at the time of the commencement of this suit, resided and dwelt, and still does reside and dwell, within two miles from the defendant, and of his said residence, namely, in Beech Street, in the city of London. That the plaintiff's cause of action herein did arise wholly or in a material part, within the jurisdiction of the Clerkenwell County Court of Middlesex, that is to say, the defendant's acceptance of the said bill, the same having been accepted by him at his said residence, No. 2, Rahere Street aforesaid, and which said last mentioned residence is within the jurisdiction of the Clerkenwell County Court of Middlesex, at Duncan Terrace, Islington, in the said county; and that no officer of any County Court is a party to this action, or was so at the time of its commencement. That the defendant was, at the time of the commencement of this

An action on a bill of exchange to recover less than 20*l*., is within the 129th section of 9 & 10 Vict. c. 95, and not within the 128th section; and therefore, a plaintiff, bringing it in a superior Court, is not entitled to costs.

On a motion to enter a suggestion to deprive the plaintiff of costs in such an action, it is not necessary that the affidavits in support of the motion should shew that the Judge, before whom the cause was tried, did not certify that it was a fit action to be brought in the superior Court.

*3-1413-116.
6-1413-710.
12-1413-900.*

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suit, liable to be summoned to the said last mentioned Court for the payment of the said acceptance and interest; and that, for the said cause of action, a plaint might have been entered against him by the said plaintiff in the said County Court. That the said Clerkenwell County Court for Middlesex, held at Duncan Terrace aforesaid, was, at and before the commencement of this cause, and still is, a Court constituted under an act of Parliament made and passed in the ninth and tenth years of the reign of her present Majesty, intituled, "An Act for the more easy recovery of Small Debts and Demands in England." That the Honorable Mr. Justice *Coleridge*, on the 27th day of November, 1847, ordered all further proceedings to be stayed until the 5th day of Hilary Term, 1848.

The affidavit of the plaintiff in opposition to the rule stated that the bill of exchange in this action was indorsed to and discounted by him in the city of London, and not elsewhere; and not in the county of Middlesex, or within the jurisdiction of the County Court of Middlesex, or within the jurisdiction of the Clerkenwell County Court of Middlesex.

Lush now shewed cause. This is an application in effect to deprive the plaintiff of costs, on the ground that the verdict being for less than 20*l.*, and the cause of action being such for which a plaint might have been entered within the Clerkenwell County Court, the plaintiff is entitled to no costs, under the 9 & 10 Vict. c. 95, s. 129. There are two answers to this motion; first, that the action being on a bill of exchange, is within the 128th section, and, therefore, might be brought at the election of the plaintiff in the superior Court; and, secondly, that even if it be not within that section, the affidavit in support of the application is defective in not shewing that the Judge at the trial did not certify that the action was fit to be brought in the superior Court; and, therefore, does not bring the case within the 129th section. With respect to the first point,

section 128 (a) enacts, "that all actions and proceedings which, before the passing of this act, might have been brought in any of her Majesty's superior Courts of record," "where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells, or carries on his business, at the time of the action brought," "may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed." And section 129 (b), under which this application is made, and which deprives the plaintiff of costs in certain cases, applies only to actions "for any cause other than those lastly herein-before specified." The question then is, whether, in the case of a bill of exchange, the cause of action can be said to "arise wholly or in some material point within the jurisdiction of the Court within which the

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(a) 9 & 10 Vict. c. 95, s. 128. "That all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior Courts of record where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof, may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed."

any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of Record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court."

(b) Section 129. "That if

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defendant dwells, or carries on his business, at the time of the action brought." It is submitted that the statute does not apply. To an action on a bill of exchange, no idea of locality attaches. The whole scope of the statute points to actions which, in contemplation of law, may be said to have locality. A bill of exchange cannot be said to have locality; and, therefore, it is, that in an action on it, the venue cannot be changed. [*Coleridge, J.*—The same remark applies to some cases of debt and contract.] The cause of action in a bill of exchange follows the person of the holder of the bill, and, therefore, cannot be said either "wholly or in some material point," to arise within the jurisdiction of a local Court.

Even supposing, however, that the Court should be of opinion that an action on a bill of exchange is within the jurisdiction of the County Court, so as to deprive the plaintiff of costs under the 129th section, in cases where the sum recovered is under 20*l.*; it is submitted that the defendant has not, by his affidavit, brought the present case strictly within the terms of that section. By section 129 it is enacted, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of Record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract," "the said plaintiff shall have judgment to recover such sum only, and no costs;" "unless" "the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court." The affidavit here does not shew that the Judge did not certify, in which case, the plaintiff would be entitled to costs. In an application of this kind, which is to oust the plaintiff of his right to costs conferred by statute, the defendant must be held to strict proof that the plaintiff is not entitled to them. All that is alleged in the affidavit may be true, and

yet it is consistent with it that the plaintiff is still entitled to costs. The affidavit does not even bring the record before the Court, from which it might be seen whether the Judge had certified or not.

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Barstow, in support of the rule. As to the first point, the words of the act are large enough to include bills of exchange; and, therefore, in judging whether or not they are included, it is only reasonable to look to the object of the act, which was to afford a cheap remedy in all actions under 20*l*., where the nature of the action was not likely to raise complicated and difficult points of law. A demand on a bill of exchange is, generally speaking, a question as simple to be tried as an action for goods sold, which may be the consideration for which it is given. In section 58, which defines the jurisdiction of the Court, the various actions which are excluded are specifically enumerated. Actions on bills of exchange are not mentioned, and, therefore, it is but reasonable to suppose they were intended to be included within this jurisdiction.

[*Lush* said he did not mean to contend that the County Court had not a concurrent jurisdiction over bills of exchange, but only that they did not come within the 129th section as to costs.]

Barstow. As to the second objection, it is submitted that the words "unless the Judge shall certify," &c., come by way of proviso or exception, and not by way of qualification or limitation of the preceding enactment; and, therefore, the fact of a certificate having been granted, should come from the other side. It is impossible for the defendant to know whether a certificate has been granted or not. The certificate, it is apprehended, might be granted after the trial, and, indeed, even after the rule obtained, to which it would form a complete answer. Besides, here the proceeding is to inform the conscience of the Court. If this rule be

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made absolute, it does not conclude the plaintiff, who may still take issue on the suggestion. He referred to *Bishop v. Marsh* (a), where it was held that the affidavit in support of a motion to enter a suggestion for costs under the Middlesex Court of Requests' Act, need not state that the cause of action arose within the jurisdiction of the Court.

COLERIDGE, J.—I understand it to be undisputed in this case that the County Court has at least a concurrent jurisdiction, but the contention has been that the present action is not within section 129. Now that section enacts, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of Record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than twenty pounds, if the said action is founded on contract," &c., "the said plaintiff shall have judgment to recover such sum only, and no costs," &c. The causes of action "lastly herein-before specified" are those enumerated in the 128th section, which are "all actions" "where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court," &c. Now, as it is clear that actions on bills of exchange would come within the general words of the act, they would also come within the 129th section, if not excluded by being contained in the 128th section. I do not think they are within the 128th section, and, therefore, the plaintiff cannot recover costs. It is a point of so much importance, that had I entertained the slightest doubt upon the subject, which I do not, I should have taken time to consider it.

As to the remaining objection,

Cur. adv. vult.

(a) 6 Bing. N. C. 12; S. C. 8 Dowl. 1; 8 Scott, N. R. 128.

COLERIDGE, J.—The remaining question on which I suspended my judgment, because it promised to be of frequent occurrence, was raised by the following circumstances.

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The affidavit, on which the rule for entering a suggestion to deprive the plaintiff of costs, was founded, stated all the circumstances which were necessary, *primâ facie*, to bring the case within the 129th section of the 9 & 10 Vict. c. 125; but did not negative, that a certificate had been granted by the Judge, who tried the cause, that it was fit to be tried before him. And, on shewing cause, Mr. *Lush* relied on this, alleging correctly, that every thing in the affidavit might be true, and yet there might be no ground for the rule.

But I am of opinion that the answer given by Mr. *Barstow* is satisfactory. *Primâ facie*, the statute deprives the plaintiff of his costs under the circumstances stated in the affidavit; the fact relied on by the plaintiff would make the case an exception, and it is one particularly within his knowledge; if the certificate were granted at all, it would have been so on his application. If, therefore, he intended to rely on it, it was for him to bring it forward. As he has not done so, he cannot rely on the silence of the other side. The rule, therefore, will be absolute.

Rule absolute.

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In re a Plaint or Suit in the County Court of
MERIONETHSHIRE.

Between WILLIAM JONES, Plaintiff,
and

DAVID JONES and Another, Defendants.

In a plaint in the County Court, the defendants pleaded the Statute of Limitations, but without giving the notice required by the 19th rule, framed by the Judges, under the 9 & 10 Vict. c. 96, s. 78. The plaintiff required an adjournment of the case, in order to answer the plea; which was granted, and the case adjourned to a subsequent day. On that day, the case came on for hearing, and the defendants obtained a judgment in their favour, which was

A RULE had been obtained in Hilary Term, 1847, calling upon the Judge of the County Court of Merionethshire, and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue, to prohibit the said Court, &c. from further proceeding in the above plaint or action in that Court between the above parties.

It appeared, upon the affidavits, that an action had been commenced in the County Court of Merionethshire by the plaintiff against the defendants to recover the sum of 16*l*, being the principal and interest due upon a promissory note made by the defendants. The note was dated the 18th of February, 1834, and the plaint was returnable on the 23rd of July, 1847. On that day, the defendants appeared in Court, and required to be furnished with a copy of the note as better particulars. The Judge ordered that this should be done, and adjourned the plaint to the next Court, which was holden on the 11th of August. The case did not come on on that day, but stood over till the 12th of August. On that day, the defendants pleaded a plea of the Statute of Limitations, but did not give notice

entered by the clerk of the County Court in the book kept for that purpose. The defendants then left the Court. Some days afterwards they received notice that the Judge had rescinded his judgment, and that the case was adjourned for further hearing. They attended on the day named, and protested against any further hearing of the case. The Judge, however, overruled their objection, and gave judgment for the plaintiff, on the ground that the plea of the Statute of Limitations, on the former occasion, had been improperly pleaded. On motion for a prohibition, *Held*, that the Judge had no authority to rescind his former decision in the absence of the defendants; that he had therefore acted without jurisdiction, and that a prohibition must go.

Sembla, that a Judge of a County Court may alter his judgment, after it has been pronounced and recorded in the book of the Court kept for that purpose; if he do so at the same Court, and in the presence of the parties.

See post - 666.

16.23.792 (note)

25.23.918 - 24 (CP)

thereof in writing pursuant to the 19th rule of practice (a); as framed by the Judges in pursuance of the 78th section of the County Courts' Act, 9 & 10 Vict. c. 95; nor did they ask the Judge to have the case adjourned in pursuance of the latter part of that rule. The case was, however, adjourned, on the application of the plaintiff, to the 9th of September, in order to afford him time to produce evidence to answer the plea. On that day, the case came on and was heard, and a verdict given for the defendants, the costs to be divided. The entry as made by the clerk in the book of the Court was as follows:—"Adjourned from last Court (No. 65), Statute of Limitations, verdict for defendants, costs to be divided." The defendants and their attorney then left the Court; but, some days after, were served with an order for a further adjournment of the action till the next following Court, which was held on the 13th of October. They attended on that day, and protested against any further proceeding in the cause, as it had been already decided in their favour; but the Judge overruled their objection, and gave judgment for the plaintiff, with costs, on the ground that the plea of the Statute of Limitations had been improperly pleaded. It appeared on the affidavit in answer, that there was an entry in the Court book, subsequent to the one already stated, as follows:—"No. 65, same Court, the above decision rescinded, and case adjourned to the next Court;" but it was not shewn when this entry was made. The defendants and

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(a) Rule 19. "Where a defendant intends to rely on the special defence of infancy, coverture, the Statute of Limitations, or his discharge under any statute relating to bankrupts, or any act for the relief of insolvent debtors, he shall give notice thereof in writing to the clerk of the Court, five clear days before the day on which the summons is return-

able: provided always, that where such notice shall not have been given, the Judge, in his discretion, and on such terms as he shall think fit, may adjourn the hearing of the cause, to enable the defendant to give such notice such number of days before the day to which the hearing may be adjourned, as the Judge may think proper."

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their attorney's clerk both swore that they believed it was not made at the same Court or on the same day; but if at all, after the Court broke up, or on a subsequent day.

F. Bailey now shewed cause. The Judge of the County Court was right in the course which he took. The defendants had not complied with the rules of practice as framed by the Judges, by giving notice of their intention to plead the Statute of Limitations to the clerk of the Court, five clear days before the day on which the summons was returnable, pursuant to rule 19. Nor did they make any application to the Judge to adjourn the case to enable them to give such notice. The Judge was, therefore, justified, when he discovered the omission, in treating the plea of the Statute of Limitations as no plea at all. [*Coleridge, J.*—What do you say as to his rescinding his first judgment in the absence of the defendants?] It was not a complete judgment. It was merely a note or memorandum of the judgment, which it was competent to the Judge afterwards to alter. [*Coleridge, J.*—It is entered by the clerk, in the book of the Court,—“Statute of Limitations, verdict for defendants, costs to be divided,” and the parties then go away. You cannot contend that this is not a judgment.] Conceding even that it is, the Judge of a County Court must have power in certain cases to alter his judgment; and his decision, when once pronounced, is no more irrevocable than the decisions of the superior Court, who may alter their judgment at any time during the same term; *Co. Lit.* 280, a.; *Rex v. Carfile (a)*, per *Parke, J.* So in the case of quarter sessions, the whole session is considered but as one day, and a judgment may be altered at any time during the same sessions in which it is pronounced; *Dickenson's Quart. Sess. Pract.* p. 61, 5th ed. Here, there is an entry in the same book: “Same Court, the above decision rescinded, and case adjourned to the next Court.”

It is submitted, that the Judge might alter his decision at the same Court, at which he gave judgment; and although it does not appear here that it was done at the same Court, it does not appear that it was not; and this Court will require to see a clear excess of jurisdiction, before it will interfere. [He referred also to *Keen v. The Queen* (a).]

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M. Lloyd, in support of the rule. After the Judge had pronounced his decision, and it was entered in the book of the Court, and the defendants had left the Court, the Judge was functus officio, and had no more power to alter the decision in the absence of the defendants, than he would have had to pronounce judgment against them in the first instance, without summoning them before him. The defendants left the Court, and therefore they cannot be expected to know when the alteration took place in their absence; but the plaintiff no doubt could have informed the Court; and as he has not done so, it must be taken that the alteration was not made at the same Court, notwithstanding the entry which had been produced. Besides, it may be inferred from the language of the first judgment, "verdict for the defendants," that the cause was tried by a jury; and if so, the Judge had no authority to alter the verdict, when once recorded; *Co. Lit.* 227, *b*. But even if the Judge decided the case alone, he would stand in the place of the jury, and the same rule by analogy would apply. If the Judge could alter his decision on another day than the one on which it was pronounced, he might alter it months afterwards with the same reason. As to the merits of the case, it is clear that both the Judge and the plaintiff had ample notice of the defendants' intention to plead the Statute of Limitations.

COLERIDGE, J.—I am of opinion that this rule must be made absolute; not on the ground of the improper exercise of a discretion on the part of the Judge of the County

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Court; for with that I could not interfere, however improper it might be; but on the ground that he has exceeded his jurisdiction by what took place after the 9th of September; unless indeed it can be said that what took place before, was altogether null and void. Now, although the plea of the Statute of Limitations may not have been properly pleaded, yet it was in fact pleaded, and no objection appears to have been made to it. After it was put in, the plaintiff applied for time to answer it, and the case was adjourned for that purpose till the 9th of September, when it was heard, and judgment given for the defendants. It does not appear whether or not it was heard by a jury; but if it was, it is clear that the Judge could have no right to alter their verdict. If it was heard by the Judge, he decided the case, his decision was recorded in the book kept for that purpose, and the judgment was complete on that day. I do not mean to say that a Judge of a County Court has no power to alter his decision at the same Court, on the same day, with the parties still before him; but he can have no authority to do so in his own Chambers after the Court is over. The defendants who had left the Court, after the decision in their favour, cannot of course speak to what occurred in their absence; but they state their belief that no alteration of the decision did take place during the same sitting of the Court; and that if it ever had been altered at all, it must have been after the Court broke up, or on a subsequent day. Surely this calls on the other side to shew when it did occur. The plaintiff, however, who had notice of this statement in the affidavits of the defendants, instead of producing an affidavit in contradiction, as he might have done if the fact had been otherwise, contents himself with relying on the entries made by the clerk in the book of the Court, as proof that it was altered at the same Court; which certainly appears to me like an evasion of the facts. I think, therefore, that there has been an excess of jurisdiction, and that the rule for a prohibition must consequently be made absolute.

Rule absolute.

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In re a *Plaint or Suit in the County Court of SUSSEX.*

Between SPARROW, Plaintiff,
and
REED, Defendant.

HUGH HILL moved for a rule calling upon the Judge of the County Court of Sussex and the defendant in the above action, to shew cause why a mandamus should not issue, commanding the said Judge to give effect to a judgment pronounced by him in the above cause on the 12th of November, 1847; or to proceed to rehear the cause.

It appeared that on the 12th of November, 1847, the above cause had come on for trial at the County Court of Sussex, before the Judge of that Court. No notice requiring the cause to be heard by a jury having been given, it was decided by the Judge, who gave judgment for the plaintiff with costs. The defendant subsequently applied to the Judge for a new trial, and that the cause might be tried by a jury. The plaintiff opposed the application, and also objected that the Judge had no power to order a new trial by jury, when the first trial had not been by jury. The Judge, however, notwithstanding, on the 27th of November, ordered a new trial, the defendant paying the costs of the application, and other costs incurred by the plaintiff. The costs were paid to and received by the plaintiff, and on the 10th of December the second trial took place before a jury, who returned a verdict for the defendant.

Hugh Hill submitted that the Judge had no power to order the second trial to be by jury, the first not having been so tried. According to the 20th rule, framed by the

After a decision in the plaintiff's favour in the County Court, before the Judge alone, an application for a new trial to be had before a jury, was made by the defendant. The plaintiff opposed the application, and objected that, under the 20th rule as framed by the Judges, under the 78th section of the County Courts' Act, the Judge had no power to order a new trial by jury, where the first trial had been decided by the Judge alone. The Judge, however, made an order for a new trial by jury, on payment of costs; and a new trial was accordingly had, and a verdict returned for the defendant: Held, that the plaintiff, by accepting the costs under the Judge's

order, had waived his right to object to the second trial.

Quere, if the Judge of the County Court, under these circumstances, had any power to make such an order?

22 *Law J. N. 129. (30)*

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Judges under the 78th section "every notice of a demand of a jury, where the debt or demand claimed shall exceed 5*l*., must be made in writing to the clerk of the Court, two clear days before the return of the summons." The 70th section of the 9 & 10 Vict. c. 95, which gives the power to try a cause in the County Court by jury, provides "that the party requiring a jury to be summoned shall give to the clerk of the Court, or leave at his office, such notice thereof as shall be directed by the rules made for regulating the practice of the Court as herein-after provided." It would, therefore, seem that there was no power to have a trial by jury in any other manner than that directed by the 20th rule. It is submitted, therefore, that the proceedings at the second trial were void, and as the order for the trial was made in invitum against the plaintiff, he is entitled to come here to ask either that the former verdict in his favour should stand, or that the Judge himself should rehear the case. [*Coleridge, J.*—Did the plaintiff attend at the second trial, and did he receive the costs under the order for the new trial?] Yes, and it may be perhaps a question whether after receiving the costs he can be now heard to object to the order.

COLERIDGE, J.—The point sought to be raised is no doubt a very important one, and very fit to be considered; but I think that under the circumstances of this case, I ought not to grant a rule. It may be that by simply appearing at the second trial, the plaintiff did not preclude himself from coming to the Court for this rule; but he was not bound to accept the costs under the rule for the new trial; and by doing so, I think he must be taken to have waived his right to come here. There must, therefore, be no rule.

Rule refused.

1848.

In re a Plaint or Action in the Bloomsbury County Court
of MIDDLESEX.

Between EDWARD ZOHRAB, Plaintiff,
and
AARON SMITH, Defendant.

A RULE had been obtained in Hilary Term last, calling on D. D. Heath, Esq., the Judge of the Bloomsbury County Court of Middlesex, holden, &c., and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in the plaint or action in that Court, between Edward Zohrab, plaintiff, and Aaron Smith, defendant, and from carrying into execution or otherwise giving effect to the judgment therein of that Court; and why the said Court should not be prohibited from paying the sum of 24*l.* 5*s.* 8*d.*, paid into Court under the said judgment to any other person than the said Aaron Smith; and that in the meantime proceedings upon the said judgment be stayed.

The affidavit of the defendant and his attorney, in support of the motion, shewed that the defendant had received from his servant, on the evening of the 14th of December 1847, a summons issued by the Bloomsbury County Court of Middlesex, requiring him to appear at a County Court to be holden at No. 28, Berners Street, Oxford Street, on the 23rd of December, to answer Edward Zohrab in an action on contract for fixtures, which summons he was informed by his servant had been delivered that afternoon at his house. That he instructed his attorney to obtain a Judge's order under the 90th section of the 9 & 10 Vict. c. 95, to remove the plaint into this Court, on the ground

On the 23rd of December, 1846, a plaint was heard and determined in a County Court, in the absence of the defendant, it being proved to the satisfaction of the Judge of the Court that the original summons had been duly served on the defendant as required by the 11th rule, made by the Judges of the superior Courts, under the 78th section of the County Courts' Act. On the 13th of January, 1847, the defendant moved for a new trial, on the ground that the requisitions of the 11th rule as to service had not been complied with. Witnesses were heard on both sides, and the Judge

decided that he was satisfied that the rule had not been complied with, but that he was of opinion, under the circumstances, that the objection had been waived; but offered to grant a new trial on an affidavit of merits: *Held* no ground for a writ of prohibition to issue.

Seemle, that a compliance with the terms of the 11th rule, which requires that it shall be proved, to the satisfaction of the Judge, that the service of the summons had come to the knowledge of the defendant ten clear days before the return day of the summons, is not a condition precedent necessary to give jurisdiction.

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that several intricate questions of law would arise; and that on the 18th day of December, the learned Judge, before whom the matter was heard, made an order that the plaint should be removed into this Court, the defendant undertaking to pay extra costs occasioned by the removal, if the Judge at the trial should certify that it was a fit case for the County Court. That his attorney drew up the order and caused a copy to be served the same day on the plaintiff's attorney, and another copy on the 20th of December, on the clerk of the County Court; and on the same day caused an appearance to be entered in this Court for the defendant at the suit of the plaintiff, and gave notice thereof to the plaintiff's attorney. That believing that the plaint was thus removed, neither he nor his attorney attended at the County Court on the 23rd of December. That he accidentally heard on the 29th of December, that the plaint had been heard on the 23rd. That on the 30th, his attorney sued out a certiorari and took it to the clerk of the County Court, who informed him that the plaint had been heard and determined on the 23rd, and advised him to apply for a new trial. That he gave notice accordingly of an intention to apply on the 13th of January, 1848. That he did accordingly apply on that day, and shewed the Judge by two witnesses that the summons was never left till the 14th of December, less than ten clear days before the day on which the plaint was heard, contrary to the rule 11 (a) of the County Court rules, which requires that ten clear days should intervene between the service of the summons and the day on which the service is returnable. That the bailiff, however, who served the summons was called, and swore that he served it on the 11th of Decem-

(a) Rule 11. "Provided that in all cases where a summons to appear to a plaint shall not have been served personally, and the defendant shall not appear at the return day, it must be proved to

the satisfaction of the Judge, that the service of such summons has come to the knowledge of the defendant ten clear days before the said return day."

ber. "That the said Judge in deciding upon the said application, stated that he was of opinion that the summons was served on the 11th of December, though it had not come to the knowledge of the said Aaron Smith until the 14th of December; but as he the Judge felt the 11th rule was a very inconvenient one, very slight evidence satisfied him with regard to the service. He, however, admitted, that in this case he had no evidence whatever that the said summons had come to the knowledge of the said Aaron Smith before the 14th of December. And the said Judge went on to say, that he thought that the irregularity was one which Aaron Smith might waive; and, as he was of opinion that he the said Aaron Smith had by the application to the Hon. Mr. Justice *Erle*, waived the irregularity, he should dismiss the application with costs." That accordingly it was dismissed, with leave to the defendant, if he chose, to renew the application on an affidavit of merits. And the Judge ordered that the sum of 24*l.* 5*s.* 6*d.*, which had been paid into the Court on the 8th of January, under the order made on the 23rd of December, should be retained in Court for a fortnight.

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In answer to this application, there was an affidavit by the clerk of the County Court, which stated "that service of the original summons was proved to the satisfaction of the Judge, on the hearing of the cause by default, on the 23rd of December, as required by the 11th rule, made by the Judges of the superior Courts for the guidance of the Judges of the County Courts:" and that the subsequent application to set aside the proceedings, on the ground of the irregularity of the service, was dismissed, after hearing, by the Judge, who offered to grant a new trial on an affidavit of merits.

Knowles and *Hawkins* now shewed cause (a). A writ of

(a) Several points were raised in the argument which are not inserted, as no decision was come to on them.

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prohibition only lies where the Court, to which it is directed, has no jurisdiction (*a*). Here the County Court had clearly jurisdiction. This Court will not take notice of the rules of practice in the County Court, unless brought before them on affidavit; but even if the Court would take cognizance of the 11th rule, which requires ten clear days to elapse between the day of service of the summons and the day on which the summons is returnable, it still is not necessary to give jurisdiction that that rule should have been strictly complied with. It is a rule of practice for the guidance of the inferior Court, and this Court will not enter into questions as to their practice; *Jolly v. Baines* (*b*). And it is for the Judge of that Court to decide whether he is satisfied that it has been complied with. It appears he was so satisfied on the 23rd of December, when the plaint was heard. That was all that was requisite to give him jurisdiction; and the fact that he has since, at the request of the defendant, again inquired into the time of the service, cannot affect the question. Besides, it is submitted, that no writ of prohibition will go after sentence, except where want of jurisdiction appears on the face of the proceedings; *Ricketts v. Bodenham* (*c*). The form of the writ of prohibition is, "We prohibit you, that you hold not plea," &c. Error in proceeding is no ground for prohibition; *Grant v. Gould* (*d*). If the defendant had never been served with any process at all, and the judgment had been obtained without his having any knowledge of the proceedings whatever, the jurisdiction might have come into question; *Ferguson v. Mahon* (*e*): but that is not the case here.

Willes, in support of the rule. Wherever a Court has decided contrary to the universal principles of justice, as in

(*a*) *Fitz. Nat. Brev.* 39; 3 Bl. & M. 170.
Com. 112.

✓(*b*) 12 A. & E. 201; S. C. 4 P.
& D. 224.

✓(*c*) 4 A. & E. 433; S. C. 6 N.

✓(*d*) 2 H. Bl. 69.

✓(*e*) 11 A. & E. 179; S. C. 3 P.
& D. 143.

giving judgment against a party without summoning him, or giving him an opportunity to be heard in his own defence, it cannot be said to have jurisdiction; and a writ of prohibition will go to hinder it from proceeding further in the matter. The proceedings are not finished by sentence. The money is in the hands of the clerk of the County Court, who will pay it over to the plaintiff, if not restrained. The want of jurisdiction is not the only ground on which a prohibition issues. If, in handling matters clearly within the cognizance of an inferior Court, it should transgress the bounds prescribed by the laws of England; as if they require two witnesses to prove the payment of a legacy, or a release of tithes, a prohibition will lie; *Home v. Lord Camden* (a). He referred to *Fitzh. Nat. Brev.* 46, and to the *Dean of York's case* (b).

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COLERIDGE, J.—There have been some points discussed in the course of the argument, which had it been necessary to decide, I should have taken time to consider my judgment; but I think this case may be decided on a very simple ground. A writ of prohibition will never issue, where the Court has jurisdiction, merely because its judgment is unwise or unjust. In order to justify the issuing a writ of prohibition, it must, in general, be shewn, that the inferior Court has exceeded, or is about to exceed, its jurisdiction. In the present case, the Court below has acted on two several occasions, on the 23rd of December, and again on the 13th of January; and on one of these two occasions, if at all, it must be shewn to have acted without jurisdiction, for this application to succeed.

Now assuming that it was necessary, as a condition precedent, in order to give jurisdiction, that the Judge of the County Court should be satisfied at the hearing of the plaint, on the 23rd of December, that the 11th rule had been complied with; it distinctly appears on the affidavit of

✓ (a) 2 H. Bl. 533.

(b) 2 Q. B. 1.

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the clerk of the County Court, "that service of the original summons was proved to the satisfaction of the Judge on the hearing of the cause by default on the 23rd of December, as required by the 11th rule." It is not shewn what evidence was offered, but it was for the Judge to decide whether it was proved or not to his satisfaction; and of this he is the sole judge. In assuming it to be necessary as a condition precedent, I do not by any means wish to be understood as thinking it so. On the contrary, I consider it as merely a direction for the guidance of the Judges of those Courts. Take the case of an action in this Court, where no notice of trial has been given. Although the Court would set aside the verdict and grant a new trial, it would be difficult to say there was no jurisdiction to try.

Then as to what passed on the 13th of January. The Judge, on the application of the defendant, hears a motion for a new trial, on the ground that the 11th rule had not been complied with. Witnesses are called on either side, and the Judge comes to the decision, that the summons had not come to the knowledge of the defendant ten clear days before the return day of the summons; but that the defendant had waived the objection by applying afterwards to a Judge of this Court. Now it is impossible to contend that the Judge on this occasion had not jurisdiction to inquire into the grounds of the motion for a new trial; and his jurisdiction would not cease because he might state that, on the evidence then offered, he was convinced that his former decision was wrong.

I think, therefore, on the short and simple ground that on neither of the two occasions on which the Court below has acted, can I see that it has acted without jurisdiction, I am bound to discharge the present rule.

Rule discharged (a).

✓ (a) See *Robinson v. Lenaghan*, post, p. 713.

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LEWIS v. HANCE.

(In the full Court).

S.C. 11. 2/3. 921.

THE plaintiff, who was an attorney, having sued in this Court for a debt under 20*l.* (a), and having recovered a verdict, a rule nisi was obtained to enter a suggestion on the roll under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129, to deprive him of costs. Against which,

The County Courts' Act, 9 & 10 Vict. c. 95, does not take away the privilege of an attorney plaintiff, and subject him to the risk of costs, if he sue in a superior Court, for a cause of action for which he might have sued in the County Court.

Lush shewed cause (b). He referred to ss. 58, 67, 129, 140, and 141, of the statute; and to *Board v. Parker* (c); *Dyer v. Levy* (d); and *Gerard's case* (e).

Creasy in support of the rule, referred to *Wiltshire v. Lloyd* (f); *Com. Dig.* tit. "Attorney" (B. 3); stat. 33 Hen. 6, c. 7; *Gardner v. Jessop* (g); *Hussey v. Jordan* (h); *Wright v. Skinner* (i); *Becke v. Smith* (k).

2. *Leah R.* 329
per 7/16
not on *Stat. 33 Hen. 6*
c. 7
10/1 - 15/10
6. 27/10 - 7/11

Lord DENMAN, C. J., now delivered the judgment of the Court.—

The question in this case is, whether an attorney plaintiff is within the provisions of the stat. 9 & 10 Vict. c. 95, establishing County Courts.

(a) The action was on a bill of exchange, by the plaintiff as indorsee against the defendant as drawer; and in the course of the argument it was contended, that actions on bills of exchange were not within the County Courts' Act; but it became unnecessary to notice this point in the judgment. See *Nind v. Rhodes*, *ante*, p. 621.

(b) In Hilary Term, 1848.

(c) 7 East, 47; S. C. 3 Smith, 52.

(d) 4 Dowl. 630.

(e) 2 W. Bl. 1123.

(f) 1 Dougl. 381.

(g) 2 Wils. 42.

(h) Cited in *Board v. Parker*, 7 East, 48.

(i) 4 Dowl. 745; S. C. 1 M. & W. 144.

(k) 2 M. & W. 191.

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By section 58, jurisdiction is given in all "personal actions where the debt or damage claimed is not more than 20*l*." By section 67, it is enacted "that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this act." The only exceptions are the Universities and the Court of the Stannaries, by sections 140, and 141.

By section 129, it is enacted, "that if any action shall be commenced after the passing of this act, in any of her Majesty's superior Courts of record, for any cause other than those lastly hereinbefore specified," (the present action is not one of those specified), "for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l*., if the said action is founded on contract;" "the said plaintiff shall have judgment to recover such sum only, and no costs."

The present action is on a bill of exchange, and the verdict under 20*l*., and the motion is to deprive the plaintiff of costs under the 129th section.

It is clear that the Uniformity of Process Act, 2 Wm. 4, c. 39, which takes away the process by attachment of privilege, has not altered the right of an attorney plaintiff, although he is obliged to sue by summons like any other plaintiff; *Dyer v. Levy* (a). It seems equally clear that the 129th section would not of itself deprive an attorney plaintiff of his privilege to sue in the superior Courts without the risk of losing costs. The language of that section is not at all stronger than that of the 39 & 40 Geo. 3, c. civ. s. 12; which enacts, that "If any action shall be commenced in any other Court than the said Court of Requests, for any debt not exceeding the sum of 5*l*., and recoverable by virtue of this act in the said Court of Requests, the plaintiff shall not by reason of a verdict for him have or be entitled to any costs whatever;"—under

which act it was held, in *Board v. Parker* (a), that the plaintiff, an attorney, did not lose his privilege, and was not bound to sue in the Court of Requests, at the peril of costs if he sued elsewhere. Nor are the words so strong as those in 10 Geo. 3, c. xxix. s. 3, on which *Dyer v. Levy* was determined; for there it is provided, that no action for any debt recoverable by the said act, shall be brought in any of his Majesty's Courts at Westminster; and if it be, judgment shall be given for the defendant. Yet an attorney plaintiff was held not to be within that act. So by 23 Geo. 2, c. 33, (the Middlesex County Court Act), sect. 19, it is enacted, that "if any action shall be commenced in any of his Majesty's Courts of record, and the defendant shall be liable to be summoned to the said County Court, and the jury shall find damages for the plaintiff under 40s., no costs shall be awarded to the plaintiff in such action, but the defendant shall be entitled to double costs of suit;" yet an attorney plaintiff was held not within the act; *Hussey v. Jordan* (b). *Johnson v. Bray* (c) is to the same effect on a similar act; as is also *Willoughby v. Fenton* (d). In all these cases, the debt was recoverable in the Court created by the act, and the plaintiff might have sued there if he pleased; yet (by reason of his privilege as an attorney) he was held not bound to do so.

Unless we overrule all these cases, we cannot hold that the 129th section of the County Court Act, per se, subjects the plaintiff to loss of costs.

But the 67th section was relied on, which undoubtedly takes away the privilege of an attorney when defendant; for it enacts, that no privilege shall be allowed to any person "to exempt him from the jurisdiction of any Court holden under this act." It is contended, that these words are large enough to embrace the obligation of a plaintiff to sue,

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✓ (a) 7 East, 47.

✓ (c) 2 B. & B. 698; S. C. 5

(b) 25 Geo. 3, cited in the note

Moore, 622.

to *Wiltshire v. Lloyd*, 1 Dougl.

(d) 2 Jur. 1041.

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as well as the liability of a defendant to be sued, in the County Court. In the Middlesex County Court Act, 23 Geo. 2, c. 33, there is no such clause; therefore an attorney, whether plaintiff or defendant, has been held not to be within that act. In the other acts, on which the cases cited have turned, there is such a clause. In the 39 & 40 Geo. 3, c. civ. s. 10, it is enacted, that "no privilege shall be allowed to exempt any person from the jurisdiction of the said Court of Requests, on account of his being an attorney or solicitor; but that all attornies and solicitors shall be subject to the several processes, orders, judgments, and executions in the same manner as any other persons." The Court, in *Board v. Parker* (a), held these words to be applicable only to defendants. The 67th section of the County Courts' Act is in the same language as the early part of the 10th section of the 39 & 40 Geo. 3, c. civ.; but the subsequent words about "processes," &c. are not inserted; and the Court, in *Board v. Parker*, commented on those latter words undoubtedly, though the decision does not appear to have turned upon them.

A debtor, when sued in the County Court, is at once placed within its jurisdiction; and the abolition of any privilege, which would otherwise exempt him from it, is intelligible. But it is difficult to see how a creditor, who does not choose to sue in the County Court, though he may do so, but who chooses to sue in a superior Court, as he still may at the peril of costs, can be said to be within the jurisdiction of the County Court. That Court cannot in any way punish him or call him to account for not suing in it, or exercise any sort of jurisdiction over him, as to costs or otherwise, when he sues in another Court. He requires no privilege to exempt him from the jurisdiction of the County Court, for he never was within it, and therefore the abolition of any privilege he may have cannot affect his position as regards the jurisdiction of the Court.

/ (a) 7 East, 47.

It is true that an unprivileged person suing in the superior Courts, when he might have sued in the County Court, is liable to forfeiture of costs; but that is by reason of the enactment in the 129th section, and in no way depends on the 67th section, which seems wholly inapplicable to a creditor not choosing to sue in the County Court. If the words of the 67th section had been that "no privilege should be allowed to any person to exempt him from the provisions of this act," or any similar words, they would, no doubt, have embraced attorneys plaintiffs; but the words are, "from the jurisdiction" of the County Court, that is, from being dealt with, from having power exercised over him by the County Court. But it is plain that the County Court cannot deal with, cannot exercise any power over, creditors privileged or unprivileged, who refuse to sue in that Court.

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Neither of the sections, 67 or 129, then, per se, affect an attorney plaintiff suing in a superior Court. Can we then apply the 67th section to the 129th, so as to see that, reading them together, the Legislature clearly intended to take away the privilege of an attorney plaintiff, and subject him to the risk of costs, if he sue in a superior Court, when he might have sued in the County Court? We think that we cannot, and that, however desirable it may be that attorneys should be subjected to that risk like other plaintiffs, the Legislature has not so said, even if it so intended.

Rule discharged (a).

(a) There was a similar case of *Jones v. Savage*, where both plaintiff and defendant were attorneys, decided in the same

Term; the Court saying that it must follow the decision in the above case.

See the following case.



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[The following cases, relating to County Courts, decided in subsequent Terms, may be here conveniently inserted].

JEFFREYS v. BEART (a).

The privilege of an attorney defendant to be sued in the superior Court of which he is an attorney, is taken away by the London County Court Act, (10 & 11 Vict. c. lxxi. s. 49.)

The plaintiff, in an action of assumpsit against the defendant, an attorney, recovered a verdict before the sheriff, on a writ of trial, for less than 20*l*. *Held*, on motion to enter a suggestion to deprive the plaintiff of costs under the above act, that the 113th section, depriving the plaintiff of costs in such cases, applied; although the sheriff had no power to certify: the proper course for the plaintiff to have adopted being, to have inserted in the order for the writ of trial that the sheriff should have power to certify.

THIS was a rule, calling upon the plaintiff to shew cause why he should not bring in the roll, and why the defendant should not be at liberty to enter a suggestion thereon, under the 10 & 11 Vict. c. lxxi., the London County Court Act, to deprive the plaintiff of costs.

It appeared that in an action of assumpsit against the defendant who was an attorney residing in London, the plaintiff had recovered a verdict for 2*l*. 3*s*. 6*d*. The cause was tried before the undersheriff of Middlesex, under a writ of trial; but no power had been reserved in the order for the sheriff to certify. The above rule having been obtained on an affidavit shewing that the plaintiff and defendant both resided within the jurisdiction of the County Court, and that the cause of action was such that a plaintiff might have been entered for it in the County Court;

Bramwell shewed cause. It is submitted that the defendant was not liable to be sued in the London County Court. By the 49th section of the 10 & 11 Vict. c. lxxi, it is enacted, "that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of the Court." There is no subsequent exception contained in the statute, so that the section must be read as if the words "hereinafter excepted" were omitted. In the corresponding section in the General County Courts' Act, 9 & 10 Vict. c. 95, s. 67, is to be found a similar enactment, but then there are in that act

(a) This case was decided in Trinity Term, 1848.

two subsequent sections, 140 and 141, creating certain exceptions. It seems to be clear that general words will not destroy the privilege of an attorney to be sued in his own Court; and great stress was laid, in the late case of *Lewis v. Hance* (a), which was the case of an attorney plaintiff, on the fact of there being certain exceptions afterwards specified in the act, amongst which that of an attorney was not included. The privilege is the privilege of the client, whose affairs might suffer, if the attorney were to be called away to answer an action before an inferior tribunal; *Welles v. Trahern* (b); *Jolliffe v. Langston* (c). [*Wightman, J.*—In *Lewis v. Hance*, the Court seems to have decided this question.] [*Ball* referred to *Jones v. Brown* (d).] The question in both those cases was as to the privilege of an attorney plaintiff. Any observation of the Court as to the case of an attorney defendant was extrajudicial. There may be great doubt too, whether the words of the 113th section depriving the plaintiff of costs where he recovers a less sum than 20*l.*, apply to a case like the present, tried before the undersheriff, who has no power to certify. The words in the section are, “if any action shall be commenced in any of her Majesty’s superior Courts,” &c., “and a verdict shall be found for the plaintiff for a sum not more than 20*l.*,” “the said plaintiff shall have judgment to recover such sum only and no costs;” “unless” “the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior Court.” In inflicting the loss of costs in these cases, it obviously contemplated the prevention, by the power given to the Judge to certify, of the hardship which might sometimes otherwise occur. *Jones v. Bond* (e), is an authority that a sheriff has no power to certify under words like these. If then he has no authority to certify, it would be a hard construction of the act to say that a verdict obtained before him, is a verdict within the section. [*Wightman, J.*—

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✓ (a) *Ante*, p. 641.(b) *Willes*, 233.✓(c) 1 *Ld. Raym.* 342.✓ (d) *Post*, p. 716.✓(e) 5 *Dowl.* 455; *S. C. nom.**div.* 2 *M. & W.* 313.

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You might have had the power to certify inserted as a term in the order.] The section must be construed strictly as it deprives the plaintiff of the right he would otherwise have had to costs; and it certainly would not apply to any other case than that of a verdict of a jury, as for instance, a judgment by default.

Ball, in support of the rule, was not called upon.

WIGHTMAN, J.—I think that the privilege of a defendant attorney to be sued in the superior Courts is clearly taken away by the terms of this act. The section depriving the plaintiff of costs then applies; and, if the plaintiff had wished to bring himself within the exception, he should have applied, when the writ of trial was moved for, to have had it made a term, that the sheriff should have the same power to certify as a Judge of one of the superior Courts.

Rule absolute.

In re a Plaintiff or Suit in the County Court of CAMBRIDGE.

Between J. LILLEY, Plaintiff,

and

J. HARVEY, Defendant (a).

Under the
9 & 10 Vict.
c. 95, s. 58,
the Judge of
a County
Court, upon
objection
made that
"the title to
land," &c. is
in question,
has authority
to ascertain whether it really is so or not.

A RULE had been obtained in Hilary Term, 1848, calling upon the Judge of the County Court of Cambridge, and the plaintiff in the above suit, to shew cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in the plaint or action in

(a) This case was decided in Trinity Term, 1848.

Where upon a plaint for use and occupation in the County Court, the defendant objected, under the 58th section of the County Courts' Act, 9 & 10 Vict. c. 95, that the title to land, &c., came in question: *Held*, that the jurisdiction of the County Court was not ousted by the mere oath of the defendant, but that the Judge was bound to inquire into so much of the case as was necessary to satisfy him that title was really in question. It is otherwise where title is raised on the pleadings.

In any case, if the Judge is wrong, and assumes jurisdiction where the title really is in question, the defendant, upon making that appear to the superior Court, would be entitled to a prohibition.

6. St. Tr. 274.

1. Nant. R. 218.

14-213-713.

23 L.J. 218-32. (20)

that Court, between Joshua Lilley, plaintiff, and John Harvey, defendant; and from carrying into execution, or otherwise giving effect, to the judgment therein of that Court.

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It appeared upon the affidavits, that a plaint had been brought in the County Court of Cambridge against the defendant, for use and occupation of certain premises at Bourne, in the county of Cambridge. That upon the plaint being heard, the defendant objected to the jurisdiction of the Court, upon the ground that he claimed the premises as his own; and that, consequently, the title to the premises came in question. That the Judge of the County Court thereupon examined into the facts, (which are sufficiently detailed in the judgment of the Court, *post*, pp. 652, 3), and being of opinion that the title did not really come in question, proceeded to hear the case, and decided it in favour of the plaintiff; upon which the present rule was obtained; against which

Burham shewed cause (*a*). The question in this case arises under the 58th section (*b*) of the 9 & 10 Vict. c. 95, which excepts from the jurisdiction of the County Court, "any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments" "shall be in

(*a*) In Trinity Term, 1848.

(*b*) 9 & 10 Vict. c. 95, s. 58, enacts, "That all pleas of personal actions, where the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise, may be holden in the County Court, without writ; and all such actions brought in the said Court shall be heard and determined in a summary way in a Court constituted under this act, and according to the provisions of this act: Provided always, that the

Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

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question." And the question is, whether the mere statement that title is in question, is sufficient to oust the jurisdiction; or whether the Judge may not inquire into the facts, and, if he be of opinion that the title is not *bonâ fide* in dispute, proceed to hear and dispose of the case. There is no express authority upon this point, but decisions have been come to in analogous cases, which shew that the latter construction is the correct one. In *Reg. v. Dodson (a)*, where a party had been convicted under section 24 of the 7 & 8 Geo. 4, c. 30, of having wilfully and maliciously damaged growing wood, it was held that a proviso in that section, exempting from the penalty there imposed, any person acting under a reasonable supposition of right, did not oblige the justices to dismiss a charge made under that section upon the mere statement of the accused party that he had so acted; but that in default of proof by him, they might judge, from all the circumstances, whether or not he did so act. So, in a proceeding before justices to enforce a church rate under the 53 Geo. 3, c. 127, s. 7, which enacts, that if the validity of the rate be disputed, and notice thereof given to the justices by the disputing party, they shall forbear giving judgment in the case, it was held that a mere statement by the party that he disputed the rate, and that he had entered a caveat in the Ecclesiastical Court against its being allowed, did not deprive the justices of jurisdiction; but that they were bound to hear and examine whether the rate was *bonâ fide* disputed; *Rex v. Wrottesley (b)*. That was even a stronger case than the present, for there the party had actually taken the proper step to dispute the rate. If, then, the Judge had jurisdiction to inquire into whether the title came in question or not, his conclusion on the facts, whether true or false, would not affect his jurisdiction; *Brittain v. Kinnaird (c)*; *Reg v. Bolton (d)*; *Reg v. Higgins (e)*.

(a) 9 A. & E. 704.

✓ (d) 1 Q. B. 66; S. C. 4 P. & D. 679.

✓ (b) 1 B. & Ad. 648.

✓ (c) 1 B. & B. 432; S. C. 4

(e) 8 Q. B. 149, note (d).

Moore, 50.

[The Court called on]

Naylor to support the rule. The act of Parliament could not mean that the Judge of the County Court might give himself jurisdiction by wrongly deciding that title was not in question, when in point of fact it was; for such a construction would render the proviso in the 58th section inoperative. In *Tinniswood v. Pattison* (a), which was a case before the present act came into operation, it was held that the jurisdiction of the County Court was ousted by a plea or cognizance setting up a title to the freehold, although no issue was taken on that part of the plea or cognizance. There *Cresswell*, J., in giving judgment, says, "the jurisdiction of the County Court was at an end the moment the title to the freehold was pleaded." [*Wightman*, J.—It surely would not be sufficient to oust the jurisdiction, for the defendant simply to state that the title came in question, without offering any proof. And if he offers proof, must not the Judge examine whether it be sufficient? There is a very good note upon this subject in Mr. *Udall's* book upon the County Court Act. His Lordship then read the passages referred to below (b).] He referred to *In re Gwynne v. Knight* (c).

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Cur. adv. vult.

✓ (a) 3 C. B. 243.

(b) "The rule appears to be, that to ascertain whether a case is within the exception of the statutes, the Courts will look to the record generally, and, *if that is not conclusive, will consider the evidence.* In the Irish Statute, 36 Geo. 3, c. 25, which transfers the civil bill jurisdiction to the assistant barristers' Court, there is, by section 7, a proviso, 'that the title to lands be not drawn into question in any such proceeding.' Although the decisions on this proviso have not been

uniform throughout, yet it appears now settled that no class of personal actions is excepted from the jurisdiction, but *that the facts of each case* must be investigated by evidence, to see *whether the right is in question bonâ fide.* It has, therefore, been held, that the title was not necessarily drawn into question in an action for altering a water-course, by means of which the plaintiff's garden was overflowed, *Coggins v. Gibbons*, 1 Ir. C. R. 467; and it has been held, that trespass to land may be brought

(c) Since reported, 1 Exch. 802.

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WIGHTMAN, J., delivered judgment (a).—The question in this case was, whether the title to an hereditament came in question, so as to take the case out of the jurisdiction of the County Court, under the proviso in the 58th section of the 9 & 10 Vict. c. 95. The demand was for use and occupation, and the defendant objected to the jurisdiction of the County Court upon the ground that he claimed the premises as his own, and that, consequently, the title was in question. The Judge of the County Court examined the defendant upon oath, who stated that he believed the premises were his, and that he had purchased them at a sale by auction in 1820. The Judge, however, went on with the case, and decided in favour of the plaintiff, being

generally in the assistant barristers' Court. In *Caghey v. M'Coy*, 1 Crawford & Dix. C. C. 290, Pennefather, B., says, 'It has been generally held, and I think correctly, that cases for damages for injury to the mere possession of lands are within the civil bill jurisdiction.' The case of *Caghey v. M'Coy*, illustrates the point stated above as to the difficulty of ascertaining, until a case had been in part heard, whether title comes in question or not. That case had been appealed against, and points of law argued, and Pennefather, B., had overruled the objections before it did so appear; after which he added, 'With respect to the case before me, it must go on, and if the alleged trampling and injury of the plaintiff's corn and grass be the only question, then the case will be within the civil bill jurisdiction; while, on the contrary, the jurisdiction will, in the event of title of the land coming in question, be ousted by the prohibitory

words of the seventh section of 36 Geo. 3, c. 25, which is not affected by any other statute.' A witness was examined to prove the trespass, and it came out in cross-examination, that defendant had entered for the purpose of asserting his right of way, when Pennefather, B., said, 'There now appears to be a bona fide claim to a right of way; and my opinion is, that where the act is done, as in this case, for the purpose of asserting a right of way, and a question of title to lands thus fairly arises, whether the claim be well founded or not, the barrister has no jurisdiction to hear the case.' It is laid down in several of the cases, that the defendant may have estopped himself by his own acts from objecting to the title or disputing the question. (See them collected in O'Donnell and Brady, 24.)" *Udall on the New County Courts' Act*, pp. 89, 90, 3rd ed.

(a) In Trinity Term, 1848.

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of opinion that the title did not really come in question; and upon examination of the affidavits, I am of opinion that there was not any real ground for the objection, and that the question of title was not raised *bonâ fide* by the defendant. The defendant did not pretend to have had any conveyance of the premises, or to have paid for them, or to have had possession; and, on the other hand, it appeared that the plaintiff had been in possession of the premises and receipt of the rents and profits for upwards of twenty-five years; that he had a conveyance of them, and had paid the purchase money; and that the defendant, in 1843, took the premises of the plaintiff as tenant, at a rent of 30*l.* a-year, which was paid down to November, 1846. It also appeared, that in June, 1847, the plaintiff distrained the goods of the defendant for the arrears, which were sold without replevin. That on a subsequent occasion, when it was a question whether the defendant had not taken the premises of the plaintiff jointly with his son, the defendant swore that he alone took the premises of the plaintiff. It appeared upon these facts clear that the defendant had no ground for bringing the title into question, and that it was not really in question in the case.

It was, however, contended for the defendant, that it was enough for him to state upon oath that he believed the premises were his, to bring the case within the proviso, and to take it out of the jurisdiction of the County Court; and that the Judge had no authority to inquire further.

It appears to me, that if the Judge has authority to ascertain whether the title really is in question, it is very difficult to define the limit to which his inquiry may go. It can hardly be intended by the statute that the mere assertion of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction; the Judge must be satisfied that it is in question; and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point. Where there are special pleadings, and the question is raised upon

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See 1, Rost-R. 126

them, the Judge can go no further; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the Judge must inquire into the circumstances before he can be satisfied that title does come in question. If he is wrong, and assumes jurisdiction where the title really is in question, the defendant, upon making that appear to the superior Court, would be entitled to a prohibition. Each case must depend upon its own circumstances. The cases that have been decided upon the 53 Geo. 3, c. 127, s. 7, are authorities for this view of the case. The terms of the provisos in the two statutes are not the same, but the point in question is common to both. In *Rex v. Chapelwardens of Milnrow* (a), and *Rex v. Wrottesley* (b), it was considered, that the justices in a case under the 53 Geo. 3, must be satisfied that there is a bonâ fide intention to dispute the rate, before they are bound to stop. If, notwithstanding reasonable evidence that the title is really in question, the Judge of the inferior Court still goes on, his assumption of jurisdiction may be superseded by a prohibition. But, in the present case, it appears to me that the Judge of the County Court was right, and that the title did not really come into question in the case. The rule, therefore, will be discharged.

Rule discharged (c).

✓ (a) 5 M. & S. 248.

✓ (b) 1 B. & Ad. 648.

(c) In a subsequent case of *Owen v. Pearse*, in the same term, a similar question arose. There, on a plaint in trespass in the County Court, the defendant objected to the jurisdiction, on the ground that he claimed a right for his cattle to stray into the adjoining close, per commun de vicinage. The Judge of the County Court having inquired into the alleged claim, and being of opinion that there was no title bonâ fide in dispute within the meaning of the 58th section, proceeded to hear the case, and decided in favour of the plaintiff. A prohibition having been moved for,

Walsby shewed cause.*Townsend*, in support of the rule.*Cur. adv. vult.*

WIGHTMAN, J., after delivering judgment in the above case of *Lilley v. Harvey*, stated, that upon examining into the facts of this case, he was of opinion that the Judge had decided rightly, that no title was bonâ fide in dispute; and, therefore, that the rule must be discharged.

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Rule discharged.

In re a Plaintiff or Action in the Westminster County Court
of MIDDLESEX (a).

Between EDWARD FOSTER and Another, Plaintiffs,
and
HENRY TEMPLE, Defendant (b).

(In the full Court.)

A RULE had been obtained in Easter Term, 1848, calling on the Judge of the Westminster County Court of Middlesex (a), and the plaintiffs in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the said Judge, high bailiff, and other officers of the said Court, from further proceeding in the above plaint or action in the said Court.

It appeared upon the affidavits in support of the rule, that the defendant was served with a summons, on the 3rd of April, 1848, issued out of the Westminster County Court of Middlesex, and which was marked (A.) 3967,

(a) The rule, and the affidavits in support of it, were entitled, "In re a plaint or action in the County Court of the district of Westminster," and an objection was taken on shewing cause, that there was no such Court, the title of the Court, as set out in the

order of council, made by virtue of the statute, being as above. But no opinion was pronounced by the Court upon this point; and, therefore, the objection is omitted in the above report.

(b) This case was decided in Trinity Term, 1848.

An application for a plaint was correctly made, and the plaint itself was correctly entered in the County Court against the defendant, as executor of "F. W. Taylor," but the summons described him as executor of "W. Thompson." At the hearing, the Judge of the County Court, upon its being represented to him that the Statute of Limitations would intervene to bar the plaintiffs' claim, directed a fresh sum-

mons to issue, bearing the same date and number as the first: *Held*, on motion to this Court for a prohibition, that this Court would not interfere with the course taken by the Judge of the County Court.

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and dated the 30th of March, 1848. This summons required him to appear, as one of the executors of W. Thompson, at the next County Court, to answer the plaintiffs in an action for goods sold and delivered by the plaintiffs to the testator in his lifetime, and for money paid, &c., for the use of the testator. It also appeared that, by the particulars annexed to the summons, which were not set out in the affidavit, the goods were sold and delivered to the testator on the 9th of April, 1842, and that the amount claimed of the defendant as executor was 7*l* 15*s*., together with the costs of the summons. The defendant attended by counsel in pursuance of this summons at the County Court, when the case was opened by the plaintiffs' attorney as an action against the defendant as executor of Frederick Welham Taylor, instead of W. Thompson. The defendant's counsel objected to any evidence being given to charge him as executor of Taylor, and the Judge held that the objection was fatal. The attorney for the plaintiffs then applied to the Judge to direct another summons to issue, bearing the same date and number, in order to save the Statute of Limitations. The defendant's counsel objected to this, insisting that the summons should be dismissed, or the plaintiffs be nonsuited. The Judge, however, directed another summons to issue as prayed for; and accordingly, on the 24th of April, the defendant was served with a summons bearing the same date and number as the previous one, in which the defendant was charged as executor of Taylor. The particulars of demand, which were annexed to the second summons, it was stated, corresponded exactly with those delivered with the first summons.

The affidavit in answer was made by the plaintiffs' attorney, who shewed that, on the 30th of March, he had made an application in writing to the clerk of the County Court to enter a plaint, in which Edward Foster and Edward Foster the younger were plaintiffs, and Henry Temple, one of the executors of the last will, &c. of

Frederick Welham Taylor, was defendant. That the entry as made in the plaint book of the Court was correct, and according to the above application; but that by mistake the summons had been wrongly filled up. That the Judge of the County Court held, that the first summons not having been issued in pursuance of the 59th section of the 9 & 10 Vict. c. 95 (a), it amounted to a nullity. That before he decided on issuing the second summons, he examined the application for the plaint by the plaintiffs' attorney, as well as the entry of the plaint in the plaint book itself, and also referred to the 12th rule of practice (b), framed by the Judges under the 78th section.

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The *Attorney General*, on behalf of the Judge of the County Court, shewed cause (c). The plaint here was entered correctly, but the summons was wrong. It is similar to a

(a) 9 & 10 Vict. c. 95, s. 59.
"That, on the application of any person desirous to bring a suit under this act, the clerk of the Court shall enter in a book to be kept for this purpose in his office a plaint in writing, stating the names and the last known places of abode of the parties, and the substance of the action intended to be brought, every one of which plaints shall be numbered in every year according to the order in which it shall be entered; and thereupon a summons, stating the substance of the action, and bearing the number of the plaint on the margin thereof, shall be issued under the seal of the Court according to such form, and be served on the defendant so many days before the day on which the Court shall be holden at which the cause is to be tried, as shall be directed by the rules made for

regulating the practice of the Court, as herein-after provided; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice, shall be deemed good service; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known."

(b) Rule 12. "Where any such summons has not been served as hereinbefore directed, the Judge may, in his discretion, in order to save the Statute of Limitations, direct another summons or successive summonses to be issued, bearing the same date and number as the first summons."

(c) In Trinity Term, 1848.

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case in this Court, where, if the præcipe is right, but the writ of summons is wrong, the latter may be amended (a).

Udall, on behalf of the plaintiffs, shewed cause. The defendant should have set out the particulars of demand annexed to the first summons, and then it would have appeared that he was described correctly as executor of Taylor, so that he could not have been misled.

Horry, in support of the rule. The Judge had no power to issue a second summons bearing the same date and number as the first. The 12th rule of practice only applies to cases where the summons has not been served. Here the first summons was served. He was described as executor of W. Thompson, and there is nothing to shew now that he is not so. He ought not to be deprived of the protection conferred on him by the Statute of Limitations; *Roberts v. Bate* (b).

LORD DENMAN, C. J.—The mistake seems to have arisen upon the part of the officer of the Court, in putting Thompson instead of Taylor. I think we cannot interfere with what the Judge has done.

PATTESON, J.—The plaint having been regularly entered, I think the Judge was justified in treating the first summons as altogether a nullity.

COLERIDGE, J., and ERLE, J., concurred.

Rule discharged.

(a) See *Kirk v. Dolby*, 6 M. & W. 636; S. C. 8 Dowl. 766. As to amendment generally, see note (a) to *Wood v. Hume*, ante, vol. 4, p. 139. /
 (b) 6 A. & E. 778.

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In re a certain Plaint or Action in the Clerkenwell County
Court of MIDDLESEX.

Between HENRY BYRNE, Plaintiff,
and
FRANCIS KNIPE, Defendant (a).

A RULE had been obtained in Trinity Term, 1848, calling upon the Judge of the Clerkenwell County Court of Middlesex, holden, &c., and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the said Judge, high bailiff, and other officers of the said Court, from further proceeding in the plaint or action in that Court between Henry Byrne, plaintiff, and Francis Knipe, defendant, and from carrying into execution or otherwise giving effect to the judgment therein of that Court.

The rule was obtained upon the affidavit of the defendant, who stated that, on or about the 10th day of December, 1846, he gave his promissory note to the plaintiff for 30*l.* upon a written agreement, under which the said plaintiff agreed, amongst other things, to give up to him a bill of exchange for 20*l.* then held by the plaintiff, and which said bill of exchange was drawn by the plaintiff upon and accepted by him the defendant on or about the 7th of November, 1845, and payable two months after the date thereof. That the plaintiff has never delivered over or given up the said bill of exchange to him the defendant,

Plaint in the County Court for 20*l.* for rent. Defendant appeared and pleaded pendency of another action in the Court of Exchequer upon a promissory note, the consideration for giving which was the rent: *Held*, that as they were not for the same cause of action, *eo nomine*, the jurisdiction of the County Court was not ousted.

The Judge gave judgment for the plaintiff on the 15th of February, 1848, ordering payment to be made within a week after the decision of the cause in the superior Court. The plaintiff

(a) This case was decided in Michaelmas Term, 1848.

afterwards came before him, in the absence of the defendant, and shewed that the action in the superior Court had been discontinued; whereupon the Judge granted a summons under the 98th section, calling upon the defendant to shew cause why he should not pay the amount; "the particulars of debt or claim" being, "Judgment of this Court, 15th of February, 1848, for 20*l.* debt, and 2*l.* 10*s.* 8*d.* costs." The defendant appeared, and the Judge rescinded his former order, and made an order for payment by instalments. The defendant was served with a copy of the judgment, drawn up upon this order, in the Form No. 24 in the Schedule of Forms framed by the Judges; in which it was ordered, "that the said plaintiff do recover against the said defendant the sum of 22*l.* 7*s.* 4*d.* for debt," "and 1*l.* 10*s.* 2*d.* for costs:" *Held*, on motion for a prohibition, that the latter summons was not in the nature of a fresh plaint; that the Judge had jurisdiction to make the latter order, although for more than 20*l.*; and that the insertion of the word "debt" in the judgment as drawn up, did not shew an excess of jurisdiction.

1. Kent R. 201.

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though often requested so to do; but on or about the 26th of June, 1847, the plaintiff brought an action against him in the Court of Exchequer of Pleas to recover the said sum of 30*l.* upon the said promissory note. That on or about the 31st of January, 1848, this deponent was served with a summons, issued by the Judge of the Clerkenwell County Court, holden at Duncan Terrace, in the parish of St. Mary, Islington, by which the said Henry Byrne claimed the sum of 20*l.* for rent. That on the 15th day of February then next, being the day appointed for the hearing of the said summons, this deponent attended at the said County Court, and then informed the said Judge that an action was depending in the Court of Exchequer of Pleas, for and in respect of the said promissory note, and which was the subject of the plaint in the said County Court, and produced to the said Judge the copy of the writ of summons which had been served upon him in the said action. That the said plaintiff adduced in evidence the said promissory note, and stated he gave up the sum of 10*l.* to bring the case within the power of the Court. That it was urged on behalf of deponent, that the said Judge had no jurisdiction to hear the case, as there was an action depending in her Majesty's Court of Exchequer. That the said Judge refused to adjudicate forthwith, and stated that he should take time to consider before he decided, as a difficult point of law had been raised. That on or about the 24th of February then following, deponent was served with a notice, to the effect that the said Judge had decided that within one week after the settlement of the action in the superior Court, the said plaintiff was entitled to a judgment against this deponent for the whole amount sought to be recovered in the said County Court. That on or about the 19th of February, the plaintiff caused a rule to discontinue the action in the said Court of Exchequer to be served on payment of costs, and which costs were paid on the 22nd of February then next. That on or about the 12th day of April then following, he

the deponent was served with a judgment summons to appear at the said County Court on the 17th of April then next, to be examined by the said Judge as to the means this deponent had of discharging the said debt; and this deponent attended accordingly, when an order was made whereby this deponent was to pay the sum of 15*s.* every four weeks till the said debt, amounting to the said sum of 22*l.* 7*s.* 4*d.*, and 1*l.* 10*s.* 2*d.* costs, were satisfied. That on or about the 21st of April, deponent was served from the office of the said County Court with a paper writing annexed to the affidavit, whereby judgment is given for the plaintiff therein for "the sum of 22*l.* 7*s.* 4*d.* for his debt in a certain action, together with the costs of suit, amounting to the sum of 1*l.* 10*s.* 2*d.*" (a). That he hath been informed and believes that the Judge of the County Court has no jurisdiction to deal with matters exceeding 20*l.* That he hath paid two instalments of 15*s.* each to the plaintiff under the said order, and that he believes that in case of default in payment of any of the instalments, the plaintiff will cause him to be committed to prison for the balance remaining unpaid of the said sum of 22*l.* 10*s.* 4*d.*, the debt stated to be recovered in the said judgment summons.

The affidavit in answer was made by the clerk of the County Court, and stated that it was his duty (b) as such clerk, to cause a note of all plaints, summonses, orders, judgments, executions, and all other proceedings of the Court, to be fairly entered from time to time in a book belonging to the Court. That on reference to the records of the Court, and pursuant to that note, this deponent finds that on the 26th of January, 1848, the above named plaintiff lodged a plaint against the above named defendant for the sum of 20*l.* (a copy of which plaint taken from the plaint book was set out). That the plaint was heard and

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(a) It was drawn up in the form No. 24, in the schedule of forms attached to the rules, framed by the Judges in pursuance of the 78th section of the County Courts' Act.
(b) 9 & 10 Vict. c. 95, s. 111.

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determined in the manner and to the effect following, being a true copy of the entry in the minute book directed to be kept by the defendant in such Court. "The Clerkenwell County Court of Middlesex. Minute of judgments, orders, and other proceedings, at a Court held at the Court House, Duncan Terrace, in the parish of St. Mary, Islington, within the district of the said Clerkenwell County Court of Middlesex, on the 15th day of February, 1848, before Thomas Starkie, Esq., Judge of the said Court. (No.) 1014. (Plaintiff) Henry Byrne. (Appearance) In person. (Defendant) Francis Knipe. (Appearance) By attorney. (Particulars of claim) Rent. (Amount claimed) 20*l*. (Special defence) —. (By whom jury required) —. (For whom judgment given) Plaintiff. (Amount of judgment) 20*l*. (Costs) 2*l*. 10*s*. 8*d*. (Order) Payment within one week after cause in the superior Court decided.—March 13th, plaintiff appeared in Court, and proved on oath to the satisfaction of the Court, that the said cause in the superior Court was decided on the 22nd of February, 1848." There was written across the order, "Rescinded by ~~21884~~." That it also appears from the note directed to be kept by this deponent as aforesaid, that the plaintiff caused a summons to be issued out of the said Court on the 24th of March last, under the 98th section of the act, which said summons is called a summons to defendant after judgment, or a judgment summons; and that the following is a true copy of the note made in the plaint book of such summons: "Clerkenwell County Court of Middlesex, at Duncan Terrace, in the parish of St. Mary, Islington, within the district of Clerkenwell, and county of Middlesex. Plaints for summonses returnable the 17th of April, 1848, and minute of interlocutory proceedings thereon.—1848, March 24th. ~~21884~~. (Plaintiff) Henry Byrne, 14, Rufford's Row, Islington. (Defendant) Francis Knipe, 15, Wilson Street, Gray's Inn Road, Solicitor. (Particulars of debt or claim) Judgment of this Court, 15th February, 1848,

for 20*l.* debt, and 2*l.* 10*s.* 8*d.* costs, execution 7*s.* 6*d.*; less 10*s.* 10*d.* paid into Court. (Amount claimed) 22*l.* 7*s.* 4*d.* (General fund) —. (Judge's fee) 3*s.* (Clerk's fee) 3*s.* (Bailiff's fee) 1*s.* (Total fees) 7*s.*" That the said last mentioned summons was heard and disposed of in the manner set forth in the following order, and that the judgment for 22*l.* 7*s.* 4*d.* therein recorded, consists of the amount of the balance remaining unsatisfied of the original debt and costs, as recovered by the judgment pronounced on the original hearing of the original plaint. "No. A 1014. The Clerkenwell County Court of Middlesex. Minute of judgments, orders, and other proceedings, at a Court held at the Court House, Duncan Terrace, in the parish of St. Mary, Islington, within the district of the said Clerkenwell County Court of Middlesex, on the 17th of April, 1848, before Thomas Starkie, Judge of the said Court. (No.) A 1014. (Plaintiff) Henry Byrne. (Appearance) In person. (Defendant) Francis Knipe. (Appearance) In person. (Particulars of claim) On a judgment summons of this Court. (Amount claimed) 22*l.* 7*s.* 4*d.* (Special defence) —. (By whom jury required) —. (For whom judgment given) Plaintiff. (Amount of judgment) 22*l.* 7*s.* 4*d.* (Costs) 1*l.* 10*s.* 2*d.* (Order) Order of February 15th, 1848, rescinded, and order made to pay 15*s.* every four weeks. First payment, 15th May." That the order exhibited to this honourable Court by the defendant in his affidavit, was drawn up by this deponent as such clerk as aforesaid, in conformity with the forms prescribed by the rules of practice as settled by the Judges.

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Willmore shewed cause (a). The proceedings are perfectly regular in this case, and there is no ground for a prohibition. The original plaint was for 20*l.*, and the defence which the defendant set up was, that there was an

(a) In Michaelmas Term, 1848.

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action pending in the Court of Exchequer against him, by the same plaintiff, on a promissory note for 30*l.*, part of the consideration of which was the claim of 20*l.*, for which the plaintiff was brought. This was no defence at all necessarily, nor was the Judge bound to entertain it. It might be that the promissory note was not stamped, and the plaintiff could never recover in the action in the superior Court upon it. The Judge, however, seems to have thought it reasonable that the defendant should not have to pay the money twice; and, therefore, he made an order for "payment within one week after cause in the superior Court decided." The action in the superior Court was discontinued, and the costs of the discontinuance accepted by the defendant, as appears by his own affidavit. A judgment summons was then issued, calling upon him to pay the amount of the debt and costs; and upon the parties attending before the Judge in pursuance thereof, he made an order for the payment of the debt and costs by instalments; and it is upon the judgment drawn up upon that order, that the present application, it is supposed, is grounded. It appears by the copy of the judgment served on the defendant, and which he has annexed to his affidavit, that it is adjudged "that the said plaintiff do recover against the said defendant, the sum of 22*l.* 7*s.* 4*d.*, for his *debt* in a certain action, together with the costs of suit, amounting to the sum of 1*l.* 10*s.* 2*d.*" If the defendant had brought the judgment summons before the Court, (and as he has not done so, it will be presumed to be in conformity with the entry made by the clerk of the Court (a)), it would have been seen that that sum of 22*l.* 7*s.* 4*d.*, was in truth made up of the sum of 20*l.* debt in the original plaint, and 2*l.* 10*s.* 8*d.* costs in the same, and 7*s.* 6*d.* costs of execution, minus 10*s.* 10*d.* paid into Court. By the 75th section, no evidence is to be given at the trial of any demand or

/ (a) 9 & 10 Vict. c. 95, s. 111.

cause of action except that stated in the summons. The only difficulty arises from the use of the word "debt" in the judgment; but that is in conformity with the form attached to the rules made by the Judges under the 78th section; and there is a good reason why it should be pursued. The clerk of the County Court has to account for all fees received, and as the costs in these Courts chiefly consist of the fees received, had he entered it as 20*l.* debt, and 2*l.* 10*s.* 8*d.* costs, he would have had to account for these costs twice over. The act in giving the Judge power to issue a summons on a judgment debt, must have intended to include such a judgment debt as might be recovered in that Court, with the costs incurred in obtaining it. Upon the whole facts, thereupon, it is submitted that it is plain that there has been no excess of jurisdiction. [In the course of his argument he referred to 9 & 10 Vict. c. 95, ss. 59, 75, 78, 88, 92, 98, 100, and 111.]

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Bagley in support of the rule. The first objection to these proceedings is that the Judge had no power to make any order on the first plaint, as soon as he was satisfied that an action was pending for the same cause in the superior Court. [*Patteson*, J.—It does not appear they were for the same cause of action, as the one claim was on a promissory note, and the other for rent.] It is shewn they were so by the defendant's affidavit, and indeed the Judge seems to have been satisfied of the fact, by making his judgment only to take effect from the time when the action in the superior Court should be decided. The Judge of a County Court is as much bound to give effect to a legal defence as the Judges of the superior Courts are. The question is, whether there was a good defence at the time of issuing this plaint; and the subsequent discontinuance by the plaintiff of the action in the superior Court, cannot affect it; *Knight's case (a)*. Prohibition lies if an

/(a) 1 Salk. 329; S. C. 2 Ld. Raym. 1014.

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inferior Court proceeds for the cause of a suit well commenced in the superior Court; *Com. Dig.* tit. "*Prohibition*," (A. 1). The second objection is, that the judgment given, on the 15th of February, was wrong and invalid. It ought not to have been contingent on the decision in the superior Court, over which the Judge had no control. A judgment ought to be positive in its terms, and not dependent on a contingency. It is manifestly unjust on the face of it: for, if the two causes of action were not identical, it was unjust to make the plaintiff wait the determination of the one in the superior Court; if they were, it was unjust upon the defendant, as in the event of judgment passing against him in the superior Court, there would have been two judgments against him for the same cause of action; or in the event of judgment in the superior Court being in his favour, there would be two conflicting judgments. Suppose a third case, that of a *stet processus* in the action in the superior Court, then the judgment in the County Court would be suspended altogether. A third objection is, that the proceeding, on the 16th of March, took place in the defendant's absence. He should have been called upon to shew cause; *Jones v. Jones* (a). Another objection is, that under the 98th section, the Judge had no power to entertain a claim above 20*l.*, whether composed of debt and costs, or not. That section is controlled by the 58th section, which confines the jurisdiction of the County Court to pleas of personal actions, "where the debt or damage claimed is not more than 20*l.*" The words of the 98th section are, a "judgment or order in any Court held by virtue of this act," "for the payment of any debt or damages or costs, &c." By section 88, the costs under this act are in the discretion of the Judge, and do not follow the event of the verdict; and "execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said Court." The language of the 98th section, therefore, may be satisfied

✓(a) *Ante*, p. 628.

without supposing the words "or costs," to refer to an order for debt *and* costs. There is no good reason for supposing the Legislature meant that the County Court Judges should exercise a jurisdiction in respect of plaints exceeding 20*l*., under the 98th section. That section merely contemplates the punishment of fraudulent debtors. That object is manifest from the 99th section, which only applies where the debtor has wilfully or criminally neglected to pay; *Ex parte Kinning* (a). As to the answer that the parties have used the form given with the rules framed by the Judges, there is no form of a judgment under the 98th section, and they have wrongly adopted the form given for a judgment on an original plaint. [He referred also to sections 58, 63, 64, and 65.]

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PATTESON, J.—It appears to me that when all the facts come to be known, this case is clear enough. The only right that this Court has to issue prohibition is where the inferior Court has no authority to entertain the suit, and has thereupon proceeded without jurisdiction. Now, look at the facts of the present case. A plaint is levied in the County Court for 20*l*., for rent due to the plaintiff, and is therefore clearly within the jurisdiction of that Court. At the hearing, the defendant appears and pleads the pendency of another action for the same cause in the Court of Exchequer. The Judge appears to have thought that his jurisdiction was not ousted, because the two actions were not upon the face of them for the same cause of action, the one in the Exchequer being not for rent, but for a demand upon a promissory note. I think he was right in considering his jurisdiction was not ousted, and that he might have given judgment without reference at all to the action in the Exchequer. The actions were not strictly for the same cause of action; and it is obvious that what might have been a good defence to the action in the Exchequer, namely, the

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want of a proper stamp, would have been no answer to the action in the County Court. But, at the same time, he seems to have thought that, in point of fact, the consideration for the promissory note was the debt due for rent; and that, therefore, it might be hard upon the defendant, in case the plaintiff should succeed against him in the action in the Exchequer, that he should have a judgment of this Court also against him. Therefore, in pursuance of section 92, which enacts, "that the Judge may make orders concerning the time or times, and by what instalments any debt or damages or costs for which judgment shall be obtained in the said Court, shall be paid," he made an order, as he might do, that the sum recovered should not be paid till the action in the Exchequer was decided. That order as to the payment was not a part of the judgment. Then, it appears, that afterwards the Judge was satisfied that the suit in the Court of Exchequer was determined. It was said that this took place behind the back of the defendant, but I do not think that that signifies. It does not appear that the information he received was incorrect. On the contrary, it is now shewn that the action was discontinued, and the costs attendant thereon paid to, and accepted by, the defendant. No execution issued, but a summons was granted under the 98th section. It has been called a plaint, but that cannot vitiate it. It is manifestly a summons, and is not a fresh suit, or an attempt to recover by a fresh plaint. It shews upon the face of it that it is brought to enforce the former judgment under the 98th section; for under the head of "particulars of debt or claim," it says, "Judgment of this Court 15th February, 1848, for 20*l*. debt, and 2*l*. 10*s*. 8*d*. costs, execution 7*s*. 6*d*., less 10*s*. 10*d*. paid into Court," making the "amount claimed 22*l*. 7*s*. 4*d*." It is true that upon the hearing of this summons, a judgment was drawn up for "22*l*. 7*s*. 4*d*. debt, and 1*l*. 10*s*. 2*d*. costs;" but the whole turns on whether the word judgment is to be taken in its literal sense. Now I cannot doubt that this was not a fresh suit, but merely a summons to shew cause

why he should not pay the amount adjudged to be due on the original debt; which the Judge had express power to entertain under the 98th section. The Judge then made an order for payment upon the defendant, and at the same time rescinded his former order, as he had authority to do under the 100th section. [His Lordship here read the section.] He rescinded his former order and made the present order in ease of the defendant; and then, because instead of stating for "debt and costs," he uses the word "debt" only in that order, this motion is made for a prohibition. I think no rule ought to have been granted, and that this rule must be discharged.

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Rule discharged.

In re a certain Plaint or Action in the County Court of
CAERNARVONSHIRE.

Between DAVID JONES, Plaintiff,
and
ELLIS OWEN, Defendant (a).

A RULE had been obtained in Trinity Term, 1848, calling upon the Judge of the County Court of Caernarvonshire, and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Court, the said Judge, high bailiff, and other officers of the said Court, from further proceeding in the plaint or action in the said Court, between David Jones, plaintiff, and Ellis Owen, defendant; and from carrying into execution, or otherwise giving effect to, the judgment therein

The 122nd section of the County Courts' Act (9 & 10 Vict. c. 95) contemplates those cases only, in which the ordinary relation of landlord and tenant exists. Therefore, where the party suing under that section claimed as mortgagee of the premises,

(a) This case was decided in Michaelmas Term, 1848.

and there was no sufficient evidence that the defendant, who was tenant of the mortgagor, had consented to hold under the mortgagee, or was even aware of the existence of a mortgage; this Court granted a prohibition to the County Court, after judgment given and possession delivered.

A total want of jurisdiction cannot be cured by the assent of the parties.

The judgment of the County Court was delivered on the 27th of May. On the 1st of June, affidavits in support of a rule nisi for a prohibition were sworn, and the rule obtained on the 6th. *Held*, that the defendant came within a reasonable time, although the rule was not served on the bailiff till the 7th, and he had previously delivered possession to the plaintiff on the 6th.

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of that Court; and that in the meantime proceedings on the said judgment be stayed.

It appeared upon the affidavits that, on the 15th of May, 1848, the defendant was served with a summons to appear at a County Court holden at Portmadoc on the 27th day of May, to answer why she neglected or refused to quit and deliver up to the plaintiff the possession of a certain messuage, called Sycock, aforesaid, which summons was thereto annexed. That the case was heard before the Judge of the County Court on that day. Upon the defendant's affidavit it appeared, that there was no evidence at the hearing of the said action that the plaintiff had any right, claim, or title to the said premises, except as mortgagee. That her late husband, up to the time of his death, which happened on or about the 15th day of August, 1847, held and occupied the premises mentioned in the said summons as tenant and owner thereof by virtue of a deed of feoffment, dated on or about the 7th day of February, 1846, to hold to him and his heirs for ever. That she had by her said husband seven children, all of whom were under the age of twenty-one years. That it did not appear that the plaintiff had ever been in possession of the said premises in the said summons by virtue of any mortgage, nor by any other right whatsoever. That neither she nor her husband had received any notice of a mortgage, nor had there been any action in ejectment brought. That, on the hearing of the plaint, the defendant objected that there was no privity of contract between the plaintiff and the defendant, but the Judge overruled the objection, and gave judgment for the plaintiff, and ordered immediate execution to be issued. The affidavit of the defendant's attorney stated, that he believed the action was brought by the mortgagee in collusion with certain other parties, who claimed the said premises by a title adverse to that of the mortgagor.

An affidavit in opposition was made by one Owen Williams, who stated that he was, in and previous to May

1842, seised in fee simple of the premises, and had lived there for thirty years and upwards. That on the 21st of May, 1842, he executed a mortgage to the plaintiff. That the defendant at that time was not in possession of the lands, but was, in the beginning of 1846, desirous of becoming tenant; and deponent being infirm, agreed that she and her husband should reside with deponent, "they agreeing to pay as rent the interest of the said mortgage money, and maintaining him this deponent." That William Owen, the defendant's husband, died in August, 1847, and that since his death the defendant had refused to maintain him, or pay the interest on the mortgage, or give up possession. That William Owen was never mortgagor of the premises. An affidavit was made by the clerk of the attorney, that no objection was made to the jurisdiction of the Court till after the cause was heard and determined. An affidavit was made by the assistant bailiff, that he received the order of the Court to deliver possession of the premises on the 3rd of June. That the house being locked, and the defendant not being to be found, he served the order by fastening it on the outer door of the dwelling-house of the defendant, being part of the premises; and on the 6th of June delivered possession to the plaintiff.

The affidavits in support of the rule, it appeared, were sworn on the 1st of June; the rule was dated the 5th, and served on the 7th on the high bailiff, and no notice of the rule was previously served, either on the bailiff or the plaintiff.

Welsby shewed cause (a). The defendant comes too late with this application. The sentence of the Court was put into the hands of the officer to execute, and he did execute it before any notice was given of this rule having been granted. The defendant ought to have come at once, as he was aware that the Judge had ordered immediate execution; and it is too late to grant a prohibition

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(a) In Michaelmas Term, 1848.

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after execution executed. As to the objection which was made to the jurisdiction of the Judge, namely, that the case does not come within the 122nd section of the Small Debts Act (a), it is submitted, that that section applies as

(a) Section 122. "That when and so soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the County Court to be holden under this act, and thereupon a summons shall issue to the person so neglecting or refusing; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew cause to the contrary, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to the Court proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the

landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the Judge to issue a warrant under the seal of the Court to any bailiff of the Court, requiring and authorizing him, within a period to be therein named, not less than seven or more than ten clear days, from the date of such warrant, to give possession of the premises to such landlord or agent; and such warrant shall be a sufficient warrant to the said bailiff to enter upon the premises, with such assistants as he shall deem necessary, and to give possession accordingly: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from any action which may be brought against him by any such tenant or occupier for or in respect of such entry and taking possession where such person had not, at the time of suing out the same as aforesaid, lawful right to the possession of the same premises."

well to cases where a constructive relation of landlord and tenant exists, as to those where there is the immediate and direct relation subsisting. Here the defendant became tenant on the express stipulation that he should pay by way of rent the interest due on the mortgage. The true question is, whether, under all the circumstances set forth in the affidavit, the defendant was not the tenant of the plaintiff in construction of law. If so, the case was one over which the Judge had jurisdiction under the 122nd section.

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Morgan Lloyd, in support of the rule. The application is in sufficient time. The Judge of the County Court was informed that a prohibition would be moved for. The defendant could not come sooner than he did. The case was heard on the 27th of May. On the 1st of June the affidavits were sworn, and the rule was obtained on the 5th, and the warrant was not executed till the 6th. The authorities shew that the rule that prohibition will not issue after sentence, only applies to those cases where nothing remains to be done; *In re Poe (a)*; *Fitzh. Nat. Brev.* 46 a; *Roberts v. Humby*, per *Alderson*, B. (b); 2 *Co. Inst.* 602, tit. "Art. Cler." The Judge of the County Court in this case had no jurisdiction. The statute only applies to cases where there is an actual tenancy between the parties; and it is not enough that there should exist a tenancy by construction of law. The express words of the act are, "that when and so soon as the *term* and *interest* of the tenant" "shall have ended, or shall have been duly determined by a legal notice to quit." It must, therefore, be such a tenancy as is determinable at a time certain, or such as would require a notice to quit. Here there is nothing to shew that even a constructive tenancy existed. It does not appear to whom the defendant paid the interest of the mortgage, but it would seem more reasonable to

✓(a) 5 B. & Ad. 681; S. C. 2 N. & M. 636.

✓(b) 3 M. & W. 120, 127; S. C. 6 Dowl. 82.

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suppose to the mortgagor, as it does not appear that he knew anything about the mortgage. [He was then stopped by the Court.]

PATTERSON, J.—It seems to me that the present case was clearly not within the 122nd section, for that manifestly contemplates cases where the ordinary relation of landlord and tenant exists. [His Lordship here read the section.] I do not think any thing can be clearer than that the act contemplates the ordinary position of landlord and tenant, and not that existing between mortgagor and mortgagee; and I do not find anything in the affidavits to shew that any such relation existed in the present case between the parties. I therefore think that the County Court Judge had no jurisdiction to try this case, and that as far as the right is concerned, the defendant is entitled to a prohibition.

It is said, however, that the defendant is too late in making this application. But it appears that the case was only heard before the Judge of the County Court on the 27th of May, the affidavits were sworn on the 1st of June, and the rule obtained on the 5th, before the warrant of possession was executed, although the bailiff had no notice of the rule till the 7th of June, the day following the execution. I think that the defendant came as soon as he reasonably could. It is said that the attorney for the defendant did not object to the jurisdiction, but that is not admitted on the other side. At all events, there was a total want of jurisdiction, which no assent could cure. The rule must therefore be absolute.

Rule absolute (a).

(a) *M. Lloyd* afterwards asked to have the rule absolute drawn up, with a clause commanding restitution; the officer having declined to do so, as it was not a term in the rule nisi: which was granted.

1849.

In re two Plaints or Actions in the County Court of
HERTFORDSHIRE.

Between ROBERT ELLIS, Plaintiff,
and
CHARLES PEACHEY, Defendant (a).

A RULE had been obtained in Michaelmas Term, 1848, calling upon the Judge of the County Court of Hertfordshire, and the plaintiff in the above action, to shew cause why a writ of prohibition should not issue to prohibit the said Judge, the high bailiff, and other officers of the said Court, from further proceeding in a plaint or action in the said Court, between Robert Ellis, plaintiff, and Charles Peachey, defendant, for the recovery of possession of a piece of land at Duxford, in the county of Cambridge, and the execution of a certain order made therein, the 20th of November, 1848; also from further proceeding in another plaint or action between the same parties, for recovery of a messuage and piece of garden ground at Duxford aforesaid, and the execution of a certain order made therein, dated the 20th of November, 1848.

The Judge of a County Court has no jurisdiction, under the 122nd section of the County Courts' Act, to issue a warrant to the bailiff of the Court, to give possession of premises not situated within his district; and a writ of prohibition will lie.

Quære, if the mere issuing the summonses in such a case is a ground for a prohibition?

The affidavit of the defendant, on which this rule was obtained, shewed, that on the 7th of November, 1848, he had been served with five summonses out of the County Court of Hertfordshire, two of which were for the delivery up of possession of certain lands and premises, situate at Duxford, in the county of Cambridge. That he instructed his attorney to attend on the 20th of November, at the County Court, on which day the summonses were returnable; who did accordingly attend there. That on the 21st of November, he was served with four orders, two of which were judgments for the recovery of the said lands and premises. That Duxford, in the county of Cambridge, is within the jurisdiction of the County Court of Essex, and not within the County Court of Hertfordshire.

(a) This case was argued in Hilary Term, 1849, and judgment was given in the following Vacation.

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v.
PEACHEY.

Naylor shewed cause (a). The question is, whether the Judge of a County Court has jurisdiction to entertain a plaint under the 122nd section (b) of the County Courts'

(a) In Hilary Term, 1849.

(b) 9 & 10 Vict. c. 95, s. 122.

"That when and so soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of fifty pounds by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the County Court to be holden under this act, and thereupon a summons shall issue to the person so neglecting or refusing; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and shew cause to the contrary, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to the Court proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof,

and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the Judge to issue a warrant under the seal of the Court to any bailiff of the Court, requiring and authorizing him, within a period to be therein named, not less than seven or more than ten clear days, from the date of such warrant, to give possession of the premises to such landlord or agent; and such warrant shall be a sufficient warrant to the said bailiff to enter upon the premises with such assistants as he shall deem necessary, and to give possession accordingly: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person by whom any such warrant shall be sued out of the County Court from any action which may be brought against him by any such tenant or occupier for or in respect of such entry and taking possession, where such person had not, at the time of suing out the same as aforesaid, lawful right to the possession of the same premises."

Act, 8 & 9 Vict. c. 95, (which authorizes him to order possession to be given of small tenements), where the tenement in question is not situated within the jurisdiction of the County Court, but the tenant resides within it; and it is submitted that he has jurisdiction. The jurisdiction of the County Court attaches not where the cause of action arises, but where the defendant is resident; *Winsor v. Dunford* (a). The 58th section defines the general jurisdiction of the Court, which is limited to personal actions. The 119th and 122nd sections extend it to complaints in replevin, and to complaints for the recovery of small tenements in certain cases. With regard to actions of replevin, the 120th section says, that "the complaint shall be entered in the Court holden under this act for the district wherein the distress was taken." But there is nothing in the 122nd section, or any other section, which limits the recovery to tenements situated within the jurisdiction of the County Court. On the contrary, the words are quite general; and by the 123rd section the summons "may be served either personally or by leaving the same with some person being in, and apparently residing at the place of abode of the person or persons so holding over as aforesaid;" obviously contemplating the residence of the tenant within the jurisdiction, as being the principal fact giving authority to adjudicate. If a contrary construction were to be put upon the 122nd section, it might render almost nugatory the remedy intended by the Legislature; for it would be necessary in order to give jurisdiction that both the tenant should reside, and the tenement, of which possession is sought to be recovered, be situate, within the jurisdiction. The 60th section shews, that a complaint may be levied within the district within which the defendant dwells, although the cause of action does not arise within it; and section 61 shews, "that any summons or other process" of the district Court may be served by the bailiff of any other Court.

Lush in support of the rule. It is submitted that a con-

(a) Q. B. Trinity Term, 1848, cited from 18 Law Jour. Q. B. 14.

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trary construction of the act of Parliament is the true one; and that the intention of the Legislature was to confine the jurisdiction to the district within which the tenement is situated, whether the defendant resides also within it or not. With regard to actions of replevin, it was necessary by the 120th section to limit them to the district within which the distress was taken; otherwise it might have been doubted whether they could not have been brought in any County Court in the kingdom. But the subject-matter of a plaint under the 122nd section, points to a local jurisdiction. The words are, "it shall be lawful for the Judge to issue a warrant under the seal of the Court to any bailiff of *the Court*." The 61st section applies only to *service* of process, such as summonses, subpoenas, summonses on judgments, &c.; and not to *executing* warrants of execution. The 104th section applies to the latter case, but is limited to execution against the goods and chattels or person of a party, and not to an order for delivery up of possession under the 122nd section. There is no direction respecting the execution of such an order out of the jurisdiction of the County Court which grants it; and it is submitted, that in the absence of any power to that effect being given by the statute, no such power can exist. It therefore follows, that the judgment could not be enforced, and no effective execution could be had upon it. The case of *Winsor v. Dunford* (a), which has been cited, has no reference to the present case, as that was a personal action.

Cur. adv. vult.

ERLE, J. (b)—Upon a motion for a prohibition, it appeared that the defendant resided within the jurisdiction of the Hertford County Court; but that the tenement, of which possession was sought, was situate out of that jurisdiction: and that a judgment had been given for a warrant to the

(a) Q. B., Trinity Term, 1848, Term, 1849. The judgment was cited from 18 Law Jour. Q. B. 14. delivered by *Wightman, J.*, for *Erle, J.*

(b) In the Vacation after Hilary

bailiff of the Court to deliver possession. As the bailiff has no power to execute this warrant out of his own district, I am of opinion that the rule for a prohibition must be made absolute.

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The 122nd section authorizes the Judge to issue a warrant "to any bailiff of *the* Court" to give possession.

A warrant under this section would have no force beyond the district of the Court. With respect to warrants against the goods or the person, there is a power, by section 104, to transmit them to the high bailiffs of other Courts; but no such power is given with respect to warrants for possession of tenements.

It is not necessary to decide that the issuing of a summons ought to be prohibited; but it is clear, that it is almost useless to proceed to judgment, in a district, where effective execution of such judgment cannot be had.

Rule absolute.

Ex parte PAYNE (a).

A RULE had been obtained in Michaelmas Term, 1848, calling upon the Judge of the County Court of Buckinghamshire, holden at Chesham, to shew cause why a writ of mandamus should not issue, directed to him, commanding him to hear the plaint of Phillip Payne against John Garrett, the public officer of the Chesham Building Society, to recover from the said society the amount due to the said Phillip Payne from the said society; upon notice of this rule, to be given to the said Judge and to the said John Garrett in the meantime.

(a) This case was argued in Hilary Term, 1849, and judgment was given in the following Vacation.

the statute 10 Geo. 4, c. 56, s. 27, which is incorporated in the first mentioned statute: *Held*, that the right to bring an action was taken away; and that the 9 & 10 Vict. c. 95, s. 58, did not operate to revive a power of bringing actions in the County Courts, which had been taken away from all Courts generally.

On rule for a mandamus to the Judge of a County Court to hear a plaint brought by a member of a building society within the 6 & 7 Wm. 4, c. 32, against an officer of that society, the 25th rule of the society directing a reference of all disputes to two justices of the peace, pursuant to

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The affidavit upon which the rule was obtained was made by the attorney of Phillip Payne, and stated, that as such attorney he had, in the month of September, 1848, entered a plaint in the County Court of Buckinghamshire, holden at Chesham, at the suit of the said Phillip Payne against John Garrett, the public officer of the Chesham Building Society, to recover from the said society the amount due to the said Phillip Payne upon two shares in the said society, subscribed for by him and withdrawn according to the rules of the said society; and that the said amount was less than 20*l*. That the only question in dispute was the true construction of the rules of the said society. That the defendant was then dwelling, and the cause of action arose, within the district over which the said Court had and still has jurisdiction. That the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, was not involved in the question; nor was the validity of any demise, bequest, or limitation under any will or settlement disputed, or to be disputed; nor was it for any malicious prosecution, or for any libel, or slander, or criminal conversation, or seduction, or breach of promise of marriage; nor was it an action of ejectment. That a summons was issued upon the said plaint to the defendant, to appear at the said Court on the 20th day of October then next. That this deponent appeared at the said Court on the said 20th day of October for the said plaintiff, and upon the cause being called on, the defendant appeared by his attorney, and took a preliminary objection to the jurisdiction of the said Court. That the Judge, who then presided at the said Court, decided, that the matter in difference between the parties must be heard and decided by the Registrar of Friendly Societies, pursuant to the act of Parliament, 9 & 10 Vict. c. 27, s. 15; and a judgment of nonsuit was thereupon entered by the clerk on the records of the Court. That this deponent applied to the Registrar of Friendly Societies for a summons, and the application was refused upon the ground of want of

jurisdiction. That this deponent, thereupon, served the defendant and the clerk of the said County Court with notice, that at the next Court, to be holden on the 14th day of November, he should apply for a rehearing; which notice was served seven clear days before the time of holding the said Court. That upon the said 14th day of November, at the said Court then holden, this deponent, as such attorney as aforesaid, applied to the Judge of the said Court for a rehearing of the said plaint. That the said defendant thereupon raised the same objection to the jurisdiction of the said Court. And the Judge then presiding decided, that the matter in difference between the parties must be referred to justices of the peace, and refused the application.

By the 25th rule of the society it was directed, "that all disputes be referred to two of her Majesty's justices of the peace, pursuant to 10 Geo. 4, c. 56, s. 27."

Sanders shewed cause (a). The County Court had no jurisdiction in this case. It is conceded that parties cannot by any private agreement oust the ordinary jurisdiction of the tribunals of the country; *Thompson v. Charnock* (b); but here there is a statutable ouster of the jurisdiction. This is a benefit building society within the 6 & 7 Wm. 4, c. 32, and section 4 of that statute enacts, that the provisions of the 10 Geo. 4, c. 56, "so far as the same, or any part thereof, may be applicable to the purpose of any benefit building society," "shall extend and apply to such benefit building society, and the rules thereof, in such and the same manner as if the provisions of the said acts had been herein expressly re-enacted." By the 10 Geo. 4, c. 56, s. 27, it is enacted, that provision shall be made by the rules of every society within the act, directing how

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(a) In Hilary Term, 1849.

✓ (b) 8 T. R. 139; *S. P. Mitchell v. Harris*, 2 Ves. Jun. 129; *Street**v. Rigby*, 6 Ves. Jun. 815; *Earl of Mexborough v. Bower*, 7 Beav. 127.

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disputes shall be settled between the society and any of its individual members, whether by reference to justices, or to arbitrators; and that an award made in pursuance thereof "shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without appeal, or being subject to the control of one or more justices of the peace, and shall not be removed or removable into any Court of law, or restrained or restrainable by the injunction of any Court of equity." By section 28, reference is to be made to justices, if so directed by the rules of the society; and by section 29, "every sentence, order, and adjudication of any justices under this act shall be final and conclusive, to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any Court of law, or restrained or restrainable by the injunction of any Court of equity, and that no suspension, advocacy, or reduction, shall be competent." By the 25th rule of this society, it appears, that all disputes are to be referred for decision to justices of the peace. In *Crisp v. Bunbury* (a), the same question arose upon a similar section in the Savings' Banks Act, 9 Geo. 4, c. 92, s. 45, which directed disputes arising between the savings' banks and any of its members, to be referred to two arbitrators, and in case of their not agreeing, to a barrister; and enacted, that "whatsoever award, order, or determination shall be made by the said arbitrators, or by the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal:" and it was held that that section ousted the jurisdiction of the ordinary tribunals in cases of disputes between a savings' banks and its depositors, and that the only remedy was by reference as pointed out by that section. By the 25 Geo. 3, c. 51, penalties of 50*l.* and of 10*l.* were created, and it was enacted, that the former should be sued for in any of the

/(a) 8 Bing. 394; S. C. 1 M. & Scott, 646.

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Courts at Westminster, and that justices of the peace might hear and determine the latter; and it was held, the jurisdiction of the superior Courts as to the 10*l*. penalties was ousted; *Cates v. Knight* (a). The late case of *Cutbill v. Kingdom* (b), in the Court of Exchequer, which at first sight might appear to be an authority the other way, is in truth not so; because the decision there that the remedy in the superior Court was not affected by the arbitration clause, was on the ground that the subject-matter of the dispute was not included in the terms of the arbitration clause.

Smythies, in support of the rule. The cases of *Thompson v. Charnock* (c), and *Earl of Mexborough v. Bower* (d), are authorities that an arbitration clause, like the one in the present case, will not oust the jurisdiction of the ordinary tribunals. Then, is the jurisdiction taken away by statute? If so, it must be either by express words or necessary implication. The words used give an option only of going before arbitrators or justices, and if the party chooses to do so, no doubt their decision is to be final, and cannot afterwards be questioned. Where the Legislature intended to exclude any other remedy than that pointed out by the statute, they have used express and distinct language to that effect. Thus, in the late Friendly Societies Act, 9 & 10 Vict. c. 27, s. 15, it is provided, that disputes may be referred in writing to the registrar of friendly societies, "and where the value of such subject-matter in dispute does not exceed 20*l*., every such dispute *shall be so referred*," &c. By section 22 of that statute it is enacted, "that this act shall be construed with and as part of" the 10 Geo. 4, c. 56, and the 4 & 5 Wm. 4, c. 40. But section 15 above alluded to, applies only to disputes between "the trustees and managers of any *friendly society*, and any member or

✓(a) 3 T. R. 442.

✓(b) 1 Exch. 494.

✓(c) 8 T. R. 139.

(d) 7 Beav. 127.

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officer thereof," and cannot apply to the present case. The main question is, whether the recent County Courts' Act, 9 & 10 Vict. c. 95, does not extend the benefit of its provisions to cases like the present. The words of the 58th section, which define the jurisdiction of the Court, are large enough to embrace the present case, and it does not come within any of the exceptions named. In *Crisp v. Bunbury* (a), which has been cited, the words of the 45th section of the 9 Geo. 4, c. 92, under which the case arose, were that the disputes "shall be referred," which is not permissive but compulsory. In *Cates v. Knight* (b), the proceeding was to recover penalties created by the act, which gave a power to the justices, but not to the Court, of mitigating the penalty; and the defendant was thus deprived of the advantage intended to be secured to him by the act.

Cur. adv. vult.

ERLE, J. (c)—Upon a rule for a mandamus to the Judge of the County Court to proceed with this action, which was brought by a member of a building society within the provisions of the 6 & 7 Wm. 4, c. 32, against an officer of that society, it was contended, that by section 4 of that statute, incorporating the provisions of the 10 Geo. 4, c. 56, ss. 27, 28, and 29; and by the 25th rule of this society directing a reference of all disputes to justices of the peace; the right to bring this action was taken away: and I am of opinion that this is so.

By those sections, provision is directed to be made by the rules, specifying whether disputes shall be referred to justices or to arbitrators; and the decision upon such reference, is made final.

These sections and this rule, providing for a cheap, simple, and speedy decision, oust the jurisdiction of the

✓ (a) 8 Bing. 394; S. C. 1 M. & Scott, 646.

✓ (b) 3 T. R. 442.

(c) The judgment was delivered in Hilary Vacation, 1849, by *Wightman, J.*, for *Erle, J.*

ordinary tribunals; *Crisp v. Bunbury*; *Timms v. Williams* (a).

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In *Cutbill v. Kingdom* (b), the action was held maintainable, because the rule there relating to reference, did not comprise the matter of that action; but, by the exception, the rule was recognised.

The 9 & 10 Vict. c. 95, s. 58, does not operate to take away the effect of these statutes from County Courts, or revive a power of bringing actions there, which had been taken away from all Courts generally.

The rule, therefore, must be discharged.

Rule discharged.

✓ (a) 3 Q. B. 413.

✓ (b) 1 Exch. 494.

In re the Arbitration between
The LONDON and NORTH WESTERN RAILWAY COMPANY,
and
JAMES B. QUICK (a).

A RULE had been obtained in Trinity Term, 1848, calling upon the London and North Western Railway Company to shew cause why they should not pay to James B. Quick, the party named in the certificate and award made herein, the sum of 32*l.* 2*s.* 4*d.*, his costs of the arbitration and his costs incidental thereto, pursuant to the certificate and award made herein between the parties; and why they should not pay the costs of this application, to be taxed by one of the Masters.

On a submission to arbitration under the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, the 34th section imposes on an umpire the duty of ascertaining whether the right of the claimant to costs under that section arises; and if it does, of settling their

(a) This case, in which judgment was given in the Vacation after Hilary Term, 1849, is here inserted, on account of its importance.

amount in his award; and he cannot, by a subsequent certificate, entitle the claimant to obtain payment of them.

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3. *Quick* - 733.
1. *Rest. R.* 267.

1849.

LONDON
and NORTH
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It appeared that Mr. James B. Quick, having a leasehold interest in certain premises on the line of the London and North Western Railway, and claiming compensation in respect of the damage done to the said premises, by heightening the roadway leading past the premises across a bridge over the railway, had, on the 17th of December, 1847, given the company notice, under the Lands' Clauses Consolidation Act, that he claimed a sum of 520*l*. for the damage arising therefrom, and that he desired to have the claim settled by arbitration. That on the 13th of January, 1848, he nominated an arbitrator on his behalf; and on the 27th of January, the railway company nominated an arbitrator on their behalf. That in their appointment, they recited the claim of Quick and his notice of appointment of an arbitrator, and proceeded thus: "Now the said London and North Western Railway Company, denying and protesting against such claim and every part thereof, and so far only as they are bound and required by any act of Parliament so to do, do hereby appoint James White Higgins, of," &c., "for them and on their behalf to arbitrate upon such claim of the said James Brannan Quick, so far only as the same is bound and required to be settled by arbitration, by or under any statute or statutes in that behalf, but no further or otherwise." That on the 8th of February, 1848, the arbitrators having neglected to appoint an umpire, Quick made an application to the commissioners of railways, under the Lands' Clauses Consolidation Act, to appoint an umpire to decide upon the matters in difference. That on the 19th of February, the commissioners of railways appointed a gentleman of the name of Powell as umpire. That on the 8th of April, he made his umpirage, which, after reciting the company's act, (by which they were bound to make and keep up a good and substantial carriage road over the bridge), and the claim and the appointment of an arbitrator by Quick, and the appointment of an arbitrator by the railway company, and the appointment of the umpire by the railway commissioners,

proceeded thus: "Now know ye, and these presents witness that I, the said George Powell, as such umpire duly appointed as aforesaid, having taken upon myself the charge of making this award, and having before taking into consideration any of the matters to me referred, duly made and subscribed the declaration hereunto annexed, and having been attended by the respective parties interested in the premises, and their agents and witnesses, and having also viewed the said premises, and having fully heard and maturely considered the allegations and evidence made and produced before me in respect to the matters to me referred; do award, decide, and determine, that the said company shall pay to the said James Brannan Quick, his executors or assigns, the sum of 51*l.* 10*s.*, as and for full compensation for all damage and detriment sustained by him, the said James Brannan Quick, in respect of the said matters so referred to me, or by the exercise by the said company of the powers contained in the said acts, or either of them. And I do hereby settle the costs of and incident to my umpirage and award, including the costs of the said James Lockyer, the arbitrator appointed for and on behalf of the said James Brannan Quick, at the sum of 36*l.* 13*s.* 6*d.*; which said sum is to be paid according to the provisions contained in the 'Lands' Clauses Consolidation Act, 1845.' As witness," &c. "Signed," &c. There was attached to the award the declaration required to be made by the arbitrator by the 33rd section. The railway company paid the sum of 36*l.* 13*s.* 6*d.* on the following day. On the 11th of May, they were served with an appointment to attend before the umpire on the 13th of the same month, to settle the amount of the costs of Quick; but they refused to attend, and gave notice to the umpire, protesting against his taking any further steps in the matter. On the day named, the umpire proceeded to settle the costs incurred by Quick, no one attending on behalf of the railway company, and gave a certificate in the following form: "In the matter of James Brannan Quick and the London and North Western Rail-

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way Company. I hereby certify that I have settled the costs of the above claimant of this arbitration and incident thereto, at the sum of 32*l*. 2*s*. 4*d*. George Powell. 13th of May, 1848." The company paid the sum of 51*l*. 10*s*., awarded as compensation, but refused to pay the 32*l*. 2*s*. 4*d*. mentioned in the certificate.

The appointment of arbitrator by the railway company, the appointment of arbitrator by Quick, and the appointment of umpire by the railway commissioners, were made a rule of Court, upon affidavits verifying the due execution of each; and the present rule was drawn up upon reading that rule, and upon affidavits shewing the due execution of the award, and verifying a copy annexed, (the original award being in the hands of the solicitors of the railway company), and shewing the due execution of the certificate for costs, which was annexed, and verifying the signature thereto; and also shewing a service of the rule, &c., and a demand and refusal by the railway company to pay the said sum of 32*l*. 2*s*. 4*d*.

Bovill (with whom was *Sir Fitzroy Kelly*) shewed cause (a). The question in this case arises upon the mode of proceeding to be adopted, where arbitrators appointed under the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, award a larger sum by way of compensation to the party whose lands are taken under the act by a railway company, than that offered by the railway company; and when consequently, by the 34th section, "the costs of" "such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking." The act appoints different modes of settling the compensation to be given for lands taken by a company under the act. Section 23 enacts, that where the compensation claimed exceeds 50*l*., it may be settled by arbitration, or by jury, as the party claiming may choose. Section 25 prescribes the

(a) In Hilary Term, 1849.

mode in which the arbitrators are to be appointed; the 27th section relates to the appointment of an umpire; and the 33rd section requires the arbitrators and umpire, before entering upon inquiry, to make a declaration in the form given in that section, before a justice of the peace, that they will honestly hear and determine the matters referred, which declaration is to be attached to the award when made. The 34th section, under which the present question arises, requires that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same, or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." In this case the arbitrators and umpire have been duly appointed, they have entered upon the inquiry, and the umpire has made his award, directing the company to pay the sum of 51*l*. 10*s*. by way of compensation, and settling "the costs of and incident to my umpirage and award, including the costs of the said James Lockyer, the arbitrator appointed for and on behalf of the said James Brannan Quick, at the sum of 36*l*. 13*s*. 6*d*., which said sum is to be paid according to the provisions contained in the Lands' Clauses Consolidation Act, 1845." Subsequent to this, and after the company have taken up the award, and paid the sum of 36*l*. 13*s*. 6*d*.; the umpire, at the request of Quick, and in spite of the protestation of the company, proceeds to make a certificate, "settling the amount of costs of the above claimant of this arbitration and incident thereto, at 32*l*. 2*s*. 4*d*." This certificate it is now sought to enforce by the present application, to which there are several answers. First, there are no sufficient materials upon which a rule for the payment of the money under the 1 & 2 Vict. c. 110, s. 18, can be granted. The certificate is a mere statement that the costs amount to a certain sum, and there is no direction

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that the company are to pay them. Their liability to such costs depends upon whether the arbitrator has awarded "the same or a less sum than" has been "offered by the promoters of the undertaking." That can only appear by affidavit; and the Court will not enforce an award, by granting a rule of this nature, where the liability of the party to pay does not appear upon the face of the award, but has to be made out by extrinsic evidence. Besides here the affidavits do not even positively state the fact that a larger sum had been awarded than the sum offered. It is only to be inferred by implication. In order to obtain a rule for payment of money under an award, the same materials are requisite as in proceeding by way of attachment. Secondly, it is submitted the proper mode of proceeding under the 34th section was for the arbitrator, as soon as he had resolved upon the sum he should award, to inquire whether it was greater than or equal to the sum offered by the company; and if it was, to have settled the costs of the claimant, and to have included them in his award. He had no power to grant this certificate as a separate instrument. When once he had made his award, he was *functus officio*. The only power he has is derived from the provisions of the statute, and there is no provision enabling him to grant a certificate settling the costs. All that the 34th section says, is, that the costs shall be borne by the company, and be settled by the arbitrator; but it does not enable him to direct the company to pay them. By the 33rd section, the arbitrator or umpire is to make a declaration therein contained before proceeding with the arbitration, and that declaration is to be annexed to the award; and the arbitrator or umpire having made such award, and wilfully acting contrary thereto, is to be held guilty of a misdemeanor. No such provision is made as to any certificate of settlement of costs under the 34th section. There is this further objection to the present application, that it does not sufficiently appear, but that these costs are included in the amount of costs settled in the award. The

words are "the costs of and incident to my umpirage and award;" and *Gordon v. Mitchell* (a) and *Ward v. Dean* (b) shew that where there is no doubt on the face of the award, even the arbitrator himself cannot be heard to shew the meaning of it. The certificate is in the light of a supplementary award, and nothing is clearer than the rule that the arbitrator must award and settle at once all the matters submitted to him; and that if he once delivers his award, although it embraces only a part of the matters referred, he cannot afterwards award upon the remaining part. The case of *Morgan v. Smith* (c) shews that where an arbitrator is to ascertain the amount of costs, he must do so in his award, and that no one else can ascertain them; and his assessment is binding; *Anon.* (d). At most, this is a mistake not apparent on the face of the award, and if so the party has no redress; *Hagger v. Baker* (e). It is difficult to understand upon what grounds this application can be put; as there is no award of any sum to be paid, and there is nothing that can be made a rule of Court, out of which the liability to pay would arise. Under the 67th section, which places the costs in the discretion of the arbitrators, where they award a less or an equal amount to the sum deposited, it seems clear that they must direct the payment of such costs by their award; and if so, the same analogy would shew they ought to have done so under the 34th section (f).

Watson and Hoggins, in support of the rule. It is submitted that there has been no error on the part of the umpire in the present case, and that the only mode of ascertaining the costs, under the 34th section, is by a separate certificate made after the award. Till the award is made, it cannot be ascertained whether the sum awarded equals or exceeds the sum offered

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(a) 3 B. Moore, 241.

✓ (b) 3 B. & Ad. 234.

✓ (c) 9 M. & W. 427; S. C. 1 Dowl. 617, N. S.

(d) 1 Chit. 38.

✓ (e) 14 M. & W. 9; S. C. *ante*, vol. 2, p. 856.

(f) *Bovill* mentioned that a similar question was pending in the Court of Exchequer, but had not come on for argument. [The rule stands enlarged to Easter Term, 1849.]

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by way of compensation. In the case of an ordinary award, where the costs are taxed by one of the Masters, it would be impossible to tax the costs before the award was made. The act of Parliament says the company are to bear the costs in certain cases, which are to be ascertained by the arbitrator. By section 36, the submission to arbitration may be made a rule of Court. It is, in point of fact, merely the nomination on either side of an arbitrator that constitutes the submission, but the provisions in the statute are incorporated in and become a part of the submission; so that it is the same as if the company had agreed in the submission to pay the amount of costs to be settled by the arbitrator, in case he should find a greater amount of compensation than had been offered. This certificate settling the costs shews that he has so found. As to those costs being already included in the award, it is clear that the words there used "costs of and incident to my umpirage and award," refer only to the umpire's costs. *Morgan v. Smith (a)* was the case of an ordinary reference not under the statute. When once the submission is made a rule of Court, it may be enforced like any other rule of Court. Section 37 shews by implication, that the award may be treated like any other award, and motion be made to set it aside. The statute of 9 & 10 Wm. 3, c. 15, is not the origin of the jurisdiction of the Courts over awards in enforcing or setting them aside. That power was exercised long before the statute, which only extended the class of cases to which it applied. Where the compensation is awarded by justices under the 24th section, the costs are in their discretion, and they are to settle them. The 34th section says they are to be borne by the promoters under certain circumstances; and section 36, in providing for the submission being made a rule of Court, must have intended that all the incidents thereto should be included. [*Erle, J.*—Suppose the umpire was to make his award on the last day limited for that purpose, you must contend that he

(a) 9 M. & W. 427; S. C. 1 Dowl. 617, N. S.

might afterwards, on a subsequent day, settle the costs of the claimant.] Yes. The arbitrators, in a submission under this statute, are ministerial arbitrators, and are bound to remain in their functions till the whole powers conferred upon them by the statute are fulfilled; *Great North of England, &c., Junction Railway Company v. Clarence Railway Company* (a); *Barker v. North Stafford Railway Company* (b). The duty of the arbitrator under the 34th section was, if the company did not tender proof that they had offered a greater or an equivalent sum to the one he awarded, to find that they had not so offered, and then to settle the costs.

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[*Bovill* referred to 8 & 9 Vict. c. 20, s. 135.]

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ERLE, J. (c)—In this case the claimant applied for a rule on the company to pay his costs of an arbitration, on affidavits stating by implication that the sum awarded was greater than any sum previously offered, and that the umpire had, by a certificate, settled the amount of such costs; and he contended that the provisions relating to arbitration were the terms of a submission under the statute, and that such terms were a part of the rule of Court when the submission was made a rule of Court; and that this was the proper mode of enforcing performance of the provision relating to costs in 8 & 9 Vict. c. 18, s. 34. To this application two answers have been given, each of which is sufficient.

First. If it be true that the provision in this section has become part of the rule of Court, yet when the liability depends on ascertaining whether a sum had been offered equal to or greater than the sum awarded, such a conditional liability cannot be enforced by a rule to pay the money.

(a) 1 Collyer, 507.

(b) Not reported.

(c) In the Vacation after Hilary

Term, 1849. The judgment was delivered by *Wightman, J.*, for *Erle, J.*

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Secondly. The provision in this section imposes on the arbitrators the duty of ascertaining whether the right to costs arises, and of including it in their award when it exists. It is generally true, that arbitrators are to decide, by their award, all that is left to their decision.

Although the amount of compensation is the primary subject for decision, it is conceded, that the costs of the arbitrators should be settled in the award; but the costs of the claimant are given by the same clause which gives the costs of the arbitrators; and the intention of the Legislature appears to be, that the right to costs, and on the part of the claimant, the amount thereof, should be settled in the same way and by the same instrument as the costs of the arbitrator.

When the amount of compensation is referred, after a sum has been deposited, a conditional right to costs, to be settled by the arbitrators, is given, by section 67, if the sum awarded exceeds the sum deposited. In that case, such costs would obviously be included in the award, seeing that the relation of the sum awarded to the sum deposited must be apparent to the arbitrators when making their award.

By analogy, therefore, the conditional right under the section now in question should also be included in the award, the arbitrators having ascertained that the condition exists.

This construction is confirmed by the consideration that the remedy for obtaining payment of costs included in the award is easy; while the process of obtaining a certificate of settlement of costs from persons who were arbitrators, but who are not to decide whether they are due; and of applying for a rule on affidavits of essential facts; is, at all events, complex and anomalous; and, in my opinion, not legal.

Rule discharged, without costs.

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In re an Inquiry of Damages and Compensation under the
Lands' Clauses Consolidation Act, 1845,
Between WILLIAM ROSS,
and
The YORK, NEWCASTLE, AND BERWICK
RAILWAY COMPANY (a).

THIS was a rule calling upon the York, Newcastle, and Berwick Railway Company to shew cause why the Master should not be at liberty to review his taxation of costs herein.

The facts were shortly as follow. The railway company, requiring to take certain premises belonging to Mr. Ross, gave notice, on the 24th of April, 1848, of their intention to cause a jury to be summoned to assess the compensation to be made to him. In the notice so given they stated, in pursuance of the 38th section of the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, that they were "willing to give" the sum of 52*L* 10*s*. for Mr. Ross's interest in the property in question. On the 8th of May following, the company caused a warrant to be served on the sheriff of Newcastle-upon-Tyne, requiring him to summon the jury; and the sheriff having subsequently appointed the 29th of May for holding the inquiry, the requisite notice of such appointment was served on Ross on the 15th of May. On the same day, and immediately after the service of the said last mentioned notice, a conference took place between Ross, Mr. Preston, his attorney, Mr. Gutch, the company's attorney, and a Mr. Dobson, an architect and agent employed by the company for the purchase of property for them in Newcastle, with a view to an amicable arrangement of the dispute; when Gutch and Dobson, on behalf of the company, made a verbal offer to Ross of 1000*L* for his interest in the property, but Ross refused to take less than

Where costs are settled by one of the Masters of the Court of Queen's Bench, under the 52nd section of the 8 & 9 Vict. c. 18, (Lands' Clauses Consolidation Act) the Court has no power to order a review of the taxation; the costs being referred to the Master, by that section, as an original arbitrator.

Quære, whether the words "the sum previously offered" in the 51st section, refer to the sum which the company "are willing to give," and which, by the 38th section, they are bound to state, in the notice of their intention to cause a jury to be summoned?

(a) This case, decided in Hilary Vacation, 1849, is here inserted on account of its importance.

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1050*l.*; whereupon Gutch stated that a formal offer of the said 1000*l.* would be made on behalf of the company. Accordingly, on the following day, the 16th of May, the following written offer was delivered to Ross:—"Mr. William Ross. With a view of settling the question of your compensation, we have obtained authority from the Directors of the York, Newcastle, and Berwick Railway Company to offer you one thousand pounds in full for all your interest in the property, and for all compensation and damage you may be entitled to from the company. At the same time we beg to state, that this sum is considerably above our estimate of what you are entitled to. And we only make the offer in order to avoid going before a jury, and in case you still determine to take us there, the costs you may incur by so doing may fall on yourself, if a less sum than the above offer be awarded you by them. We are, yours obediently, Richardson and Gutch. Newcastle, May 16, 1848." Ross refused to receive this sum, and the company proceeded with the inquiry before the sheriff, when the jury assessed the claimant's damages at 1000*l.* only,—the counsel for the claimant using the above letter before the jury as evidence of an offer to that amount. The question of costs was then submitted to the Master for taxation. The company had paid the whole of the costs of summoning, impanelling, and returning the jury, &c. The Master, in order to raise the question in the most simple form, declined either to allow any costs at all to the claimant, or to order him to repay half the costs of summoning, &c. the jury, to the company. The present rule having been obtained,

S. Temple shewed cause (*a*). It is submitted that the Court has no power to grant the present application. This is a taxation under the 52nd section of the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, s. 52, which enacts, that "the costs of any such inquiry, shall, in case of difference be

(*a*) In Hilary Term, 1849.

settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party," &c. This enactment gives the Court no power to review the taxation. The nomination of a Master of the Court of Queen's Bench, is merely a designatio personæ; and confers no more authority upon this Court to review the taxation, than if it had been provided that the costs should be settled by an indifferent person. The reference, by this section, is to the Master as an original arbitrator; and the proper mode, if any, of reviewing his decision, is by treating it as a submission, and making it a rule of Court, and then moving to set it aside. [He referred to 1 *Wms. Saund.* 327 *c.* note (*s*), 6th ed.] But even supposing the Court should hold otherwise, it is submitted that the Master was justified in refusing to allow any costs to the claimant. By the 51st section it is enacted, that "on every such inquiry before a jury," "if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking," "one-half of the costs of summoning, impanelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry." Here the same sum as was given by the verdict, had been *previously* offered by the promoters of the undertaking. It will however be said that, as the offer was not made till after the warrant for summoning the jury had been issued, the sum had not been "previously" offered within the meaning of the section. The 38th section enacts, that "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days notice to the other party;" "and in such notice," "shall state what sum of money they are willing to give for the interest in such

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lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works." The question is, whether the words "previously offered" refer solely to the sum mentioned in the notice of issuing their warrant, as that which the company "are willing to give." It is submitted they do not. The words in the 51st section, it is submitted, clearly mean "previous" to the inquiry. All statutes giving costs are to be construed strictly; *Dibben v. Cooke* (a); *Ingle v. Wordsworth* (b). Any offer made before the inquiry actually takes place, is strictly a sum "previously offered," within that section. The balance of inconvenience is in favour of such a construction, as it is in the power of the land owner to seriously obstruct any attempt to ascertain the real value of the premises. [He referred also to the 46th section.]

Granger, in support of the rule. It is submitted that the Legislature, in naming a Master of the Queen's Bench as the party before whom the costs are to be taxed, intended that a taxation under the 52nd section should have all the consequences of an ordinary taxation. But if the Court should be of a different opinion, at any rate, the construction sought to be put upon the words "previously offered" in the 51st section cannot be supported. The Legislature has provided for one of two cases; either that the costs of the inquiry shall be borne wholly by the company, in the event of the verdict being for more "than the sum previously offered;" or that the company and the claimant shall bear the costs of the inquiry between them, and each party pay his own costs, in the event of its being for the same or a less sum than "the sum previously offered." The words are, "*the* sum previously offered," not "*any* sum." There is no mention made of an offer in any other section than the 38th section, to which alone, therefore,

/(a) 2 Stra. 1005.

/(b) 3 Burr. 1284.

the words must refer. The 46th section, which requires "ten days' notice of the time and place of the inquiry," contains no provision as to any offer of a sum. A contrary construction would be most unreasonable, for it would be in the power of a railway company to insert a mere nominal sum in the notice given under the 38th section, and so defeat the intention of the Legislature in that respect; and then proceed with an inquiry, and, at the last moment, make a reasonable offer, which would expose the claimant to a moiety of the expenses of the inquiry, and all his own costs. If it had been the intention of the Legislature that an offer made subsequent to the notice of issuing the warrant by the company, should be of any avail under the 51st section; it is only reasonable to suppose, that some provision would have been made for the claimant's costs, incurred previous to the time of the offer being made.

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ERLE, J. (a)—In this case, a rule for the Master to review the taxation of costs, under 8 & 9 Vict. c. 18, ss. 51 and 52, was moved for, on the ground that the Master was mistaken in disallowing costs by reason of an offer of the sum found by the jury having been made, such offer being alleged to be of no avail, being made too late.

A preliminary objection was taken in answer, namely, that the reference is to the Master as an original arbitrator, and that the Court has no power to review the decision of the Master upon a matter so referred to him; and it appears to me that this objection must prevail, and that the principle of *Morgan v. Smith* (b) applies.

Where the Court refers the taxation to its officer, it has the power of reviewing it; because the power of the officer is delegated to him by the Court; and his act is not effective, unless adopted by the Court.

(a) The judgment was delivered in Hilary Vacation, 1849, by *Wightman, J.*, for *Erle, J.*
 ✓(b) 9 M. & W. 427.

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But the taxation in question is made without any delegation of power from the Court, and without any express or implied liability to review.

Where the Legislature intended the Court to have control over the taxation, it has directed such Court to award costs. See section 80, as to costs where the money has been deposited; section 83, as to costs of conveyances; and section 126, as to costs of litigating a title.

The rule must therefore be discharged; but without costs, as the substantial right appears to me to be with the claimant.

Rule discharged, without costs.

COURT OF EXCHEQUER.

Easter Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

In re certain Plaints or Suits in the County Court of
WORCESTERSHIRE,

Between THOMAS GRIMBLY, Plaintiff,
and
SIMEON AYKROYD, Defendant.

J.C. 1. Exch. 479.
1848.

IN Michaelmas Term, 1847, a rule was obtained by *Martin*, calling on the Judge of the Worcestershire County Court, and Thomas Grimbly, to shew cause why a writ of prohibition should not issue, prohibiting the said Judge from proceeding further in certain plaints mentioned in the affidavits on which the rule was moved for.

The 63rd section of the 9 & 10 Vict. c. 95, provides "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of

bringing two or more suits in any of the said Courts."

Held, that the term "cause of action" was not limited to one separate cause of action, but that it meant *cause of one action*, which might include many separate contracts, and that it applied to a tradesman's bill, in which each item is connected with the former one, inasmuch as the dealing is intended to be continuous; and each item when incurred is, if not paid, united with the former ones, and forms one entire demand with them.

Quære, however, whether the 63rd section applies to all debts which can be recovered in one count, under whatever circumstances incurred?

Where the alleged cause of action arose upon certain tickets which had been given by certain persons, alleged by the plaintiff to be the agents of the defendant, to certain workmen, who, upon presenting them to the plaintiff, had been supplied by him with goods; and the plaintiff had then brought 228 plaints against the defendant in respect of such supply, in the County Court for sums amounting in all to 303*l.* 19*s.*, this Court granted a prohibition; although only one sum amounted to more than 5*l.*, and most of them were under 20*s.*

Quære, whether the Court would have granted the prohibition, if the several plaints, had not in all exceeded the amount of 20*l.*?

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6. Exch. 196.
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The affidavit of Simeon Aykroyd, on whose behalf the rule was moved for, stated, that he was one of the contractors with the "Oxford, Worcester, and Wolverhampton, Railway Company," for a certain part of that line; and that he had employed a person of the name of Bugbird and other persons, as sub-contractors to make bricks, and to do other parts of the work contracted for on the railway. These persons paid their workmen from time to time, partly in money, and partly in tickets for goods, which were signed by themselves, and which purported to be orders upon Grimbly, who kept a shop for the sale of provisions and groceries at the town of Chipping Campden, and near the railway. The tickets were in the following form, or similar to it in substance:—

Michiton Hill, July 10, 1847.

Mr. Grimbly,

Let the bearer ———, have goods to the amount of 20s.

Thomas Bugbird.

As many as three thousand of these tickets had been received by Grimbly, and goods supplied by him upon their authority. On the 17th of September, Mr. Aykroyd received 228 summonses to the County Court of Worcestershire at Grimbly's suit, in as many actions on contract for goods sold and delivered. The entire amount of the 228 summonses appeared by the particulars to be 303*l* 19*s*. One only of the complaints was for a sum above 5*l*, while there were a large number for less than 20*s*. each. Mr. Aykroyd's affidavit also stated that he had never sent any persons whatever to Grimbly for any goods, and it altogether negatived his liability. There was an affidavit of Grimbly used in opposing the rule, which stated that he had received at different times within a short interval as many as 3000 of these tickets, which had been brought to him by different workmen on the railway, and that goods had been delivered by him in pursuance of them.

Whitehurst and Pigott shewed cause (a). The question is, whether each of these summonses is not issued for a separate "cause of action" within the meaning of 9 & 10 Vict. c. 95, (the County Courts' Act). By the 58th section it is enacted, that "all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the County Court, without writ; and all such actions brought in the said Court shall be heard and determined in a summary way in a Court constituted under this act, and according to the provisions of this act: provided always, that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation, under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage." By the 63rd section it is provided, "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts, but any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this act if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." There is no doubt that several tickets presented by different persons, on different days, may be treated as each creating a different cause of action. *Rex v. The Sheriff of Herefordshire* (b), is a case almost exactly similar to this one. There the plaintiff who was a carrier, carried some parcels for the defendant, and had a demand of 1*l.* 4*s.* for carriage.

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(a) In Hilary Term, 1848.

/ (b) 1 B. & Ad. 672.

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Shortly afterwards he carried another parcel, of which the carriage also amounted to 1*l*. 4*s*. He brought two several actions in the County Court for these two sums, and the defendant applied for a prohibition, which was refused by the Court of King's Bench; and Lord *Tenterden*, in giving his judgment, says, "This case does not come within the rule of law which prohibits the splitting of a cause of action into several portions, for the purpose of commencing suits for each in an inferior Court; to be so, the cause of action must be one and entire. But, in this case, the two items of 1*l*. 4*s*. each are perfectly distinct debts, the one having no connection with the other; when the defendant incurred the debt stated in the first item, the plaintiff might have sued him for it in the County Court, and his having incurred another and distinct debt with the plaintiff afterwards should not, I think, have the effect of depriving the plaintiff of his remedy in the County Court for the first debt. And if he may still have that remedy for the first debt, he has it of course for the second also." [*Pollock*, C. B.—That case would have been entitled to more weight if a rule had been granted and the matter argued, but the rule appears to have been refused.] In *Girling v. Alders* (a), which was cited when this rule was moved for, it does not appear what the contract was which was sued upon. Although there were several parcels of malt delivered, it is consistent with the case that they may all have been delivered under one contract, though at different times. The report only states that "one contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40*s*.; and he levied divers plaints thereupon in the said Court; wherefore the Court here granted a prohibition; because, though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued here, and not put the defendant to an unnecessary

✓ (a) 1 Vent. 73; S. C. *nom. div.* 2 Keble, 617.

vexation." In all the cases where prohibition has been granted, there has only been one contract which the plaintiff has been attempting to split in fraudem legis. In the 19 Hen. 6, 54, pl. 17, it was held, that if there be one entire contract above 40s., and a man sues in a Court Baron, severing it into divers small sums under 40s., a prohibition shall be granted. Again, in *Bac. Abr.* tit. "*Prohibition*," (K), it is laid down in the same terms that a prohibition shall be granted, "because it is done to defraud the Court of the King." *Fitzh. Nat. Brev.* p. 46, is to the same effect. In Mr. *Udal's* book upon the County Courts' Act, p. 97, 3rd ed., reference is made in a note to the 63rd section, to the Irish statute for giving the civil bill jurisdiction to the assistant barrister's Court, (36 Geo. 3, c. 25, s. 8), which contains the following provision, "that no cause of action still subsisting, and in the whole amounting to a sum beyond such sum as is made according to the nature of the case, recoverable by force of this act, shall be split or divided, so as to make the ground of two or more different actions, in order to bring such cases within the jurisdiction created by this act." And the case of *Hamblin v. Hamblin*, as reported in Mr. *Napier's Digest*, is referred to, where it was held, that if A. lent B. a sum of money, and some time afterwards another sum, A. might sue for them separately. *Neale v. Ellis* (a), was a case decided in the Brighton Court of Requests' Act, which provides "that it shall not be lawful for any plaintiff to divide any cause of action into two or more suits, for the purpose of bringing the same within the jurisdiction of the said Court; but any plaintiff having cause of action above the value of 15*l.*," may sue for 15*l.* and abandon the excess. In that case *Coleridge, J.*, decided, that where there were three claims by the plaintiff against the defendant, one for a horse, another for rent, and the third for goods sold and delivered, existing at the same time; the plaintiff might sue for the horse in the County Court, and afterwards sue for the others in the

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superior Court, upon the ground that they were distinct claims.

Martin and *H. Hill*, in support of the rule. No doubt where there are several contracts which are entirely distinct, they could not be said to form either one contract, or one cause of action, within the meaning of this act. But this is a very different case. If a shopkeeper goes on furnishing his customer with goods from time to time, and keeping an account against him, although there may be in one sense a separate contract upon the furnishing every distinct lot of goods, yet there is only one cause of action; because each successive claim as it is incurred becomes amalgamated in the general account. This proceeding is as much an abuse of the process of the County Court, as if a butcher, who had supplied a person with meat, some of which was supplied every day during a whole year, were to bring a separate action in respect of every day. [*Parke, B.—Hesketh v. Fawcett* (*a*) draws the distinction between one entire contract and one entire cause of action, which latter may well proceed from several contracts.] That is to the same effect as *Girling v. Alders* (*b*), where it is said, that if the "causes may be joined in one action, they must be;" *Shaddick v. Bennett* (*c*). The 58th section shews that the causes may be joined in one action; because it expressly gives the County Court jurisdiction, "where the debt or damage claimed is not more than 20*l*., whether on *balance of account* or otherwise;" which words were probably inserted to prevent a recurrence of the questions made in *Porter v. Philpot* (*d*); *Clark v. Askew* (*e*). In *Lord Bagot v. Williams* (*f*) it was held, that the plaintiff having sued the defendant in the inferior Court for money had and received, was to be considered to have so sued him for all

✓ (*a*) 11 M. & W. 356; S. C. & R. 229.

2 Dowl. 827, N. S.

✓ (*d*) 14 East, 344.

✓ (*b*) 1 Vent. 73; S. C. *nom. div.*

✓ (*e*) 8 East, 28.

2 Keble, 617.

(*f*) 3 B. & C. 235; S. C. 5 D.

(*c*) 4 B. & C. 769; S. C. 7 D. & R. 87.

the sums which he had received up to the commencement of the suit.

Cur. adv. vult.

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POLLOCK, C. B., now delivered the judgment of the Court.—In this case a prohibition to the Judge of the County Court of Worcestershire was moved for, a rule nisi was granted, and cause was shewn in the last Term, before my Brothers *Parke, Alderson, Platt*, and myself. It appeared from the affidavits, that on the 19th of September last, 228 summonses were issued out of the County Court at the suit of the plaintiff, Grimbly, against the defendant, Aykroyd, for sums amounting in the aggregate to 303*l.* 19*s.*, one claim only amounting to a sum above 5*l.*, and many to less than 20*s.* These demands arose out of an order alleged to have been given by the defendant, a railway contractor, to the plaintiff, a grocer, to supply with goods the workmen employed by certain persons, who were sub-contractors with the defendant. Tickets appear to have been given by the sub-contractors, and signed by them, each for a certain amount; and these tickets amounted to 3000; but actions were brought not for each supply, but apparently each for the amount of all the supplies to one workman. The defendant's affidavit denies all liability to these demands, on the ground that he never gave the order; or if he did, that he was not personally liable, but only as on a guarantee, and that the order was not in writing. But for the purpose of our present decision this is wholly immaterial, the question being, whether, on the assumption that he was indebted, the County Court had jurisdiction.

This depends on the construction of the Small Debts Act, 9 & 10 Vict. c. 95, particularly section 63, and not upon the old rule of the common law as to the jurisdiction of the County Court. It will be proper, however, to consider what that rule was, in order to give a construction to the County Court Act.

At common law, the County Court held no plea of debt or damages to the value of 40*s.* or above; 4 *Inst.* 266;

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Placita de catallis debitis, &c. quæ summam 40s. attingunt vel eam excedunt sine brevi Regis placitari non debent; 2 *Inst.* 302: and if an *entire* contract or debt of 40s. or upwards was severed into sums below 40s., a prohibition was granted; *Roll. Abr.* tit. "*Prohibition*," 317; and without saying that the debt arose on an entire contract. *Fitzherbert*, in his *Natura Brevium* (a), lays it down, that "if a man do owe unto another man five marks, and he sue several plaintiffs for the same in the County Court, or any other Court" (meaning, no doubt, the Hundred Court, or Court Baron), "against the debtor, he shall have a prohibition thereof, and rehearse the matter, and that he would defraud the King's Court of its jurisdiction." This doctrine was applied to contracts made at different times between the same persons for several sums, each less than 40s., but together amounting to more, in an *Anonymous case* (b); and in *Girling v. Alders* (c), which was for the price of different parcels of malt sold at different times; "because, though they be several contracts, yet forasmuch as the plaintiff might have joined them all in one action, he ought so to have done, and sued here" (in the Court above), "and not put the defendant to an unnecessary vexation, no more than he can split an entire debt into divers, to give the inferior Court jurisdiction in *fraudem legis*." The reason given is a very satisfactory one, for it would be extremely vexatious if a plaintiff, from whom goods had been purchased in small quantities, at small prices, at different times, by distinct contracts, either payable immediately or on credit which had expired, instead of uniting all in one action, which he could do after the debts were all due, should divide them into several, and sue for each in a separate action in the County Court, which could give no adequate relief by consolidating them in the exercise of their equitable jurisdiction (if they had any) as a superior Court would, for they could not unite them, so as in the aggregate to exceed or be equal to 40s.

(a) Page 46.

/ (b) Vent. 65.

/ (c) Ibid. 73; S. C. nom. *Girling v. Alders*, 2 Keble, 617.

The extent to which that vexation might be carried may be illustrated by the present case, in which it is sworn that there were 3000 different tickets, and, consequently, 3000 different items or separate contracts. It is true, indeed, that when each contract was due in cash, the creditor might, in the absence of any express or implied contract to the contrary, immediately sue for it; but when several debts had become due, he could unite them in one count on debt or simple contract, or *indebitatus assumpsit*, as one entire debt, and there seems no good reason why he should not. In the subsequent case of *Rex v. The Sheriff of Herefordshire* (a), the judgment of Lord *Tenterden*, that to bring a case within the rule of law which forbids splitting, the cause of action must be one and entire, is at variance with the law laid down in the above cited authorities. The case itself may be distinguished, because there the debts were treated as being entirely distinct and separate from each other, the one having no connection with the other; but in the case of a running bill with a tradesman, the items are generally connected; the first contract being usually made with the understanding, that if not paid for until after others have been made, it is to form part of the same debt, so that several items are to be united into one bill. But the result of the decision altogether is to render it impossible to rely on the authority of the former cases, which otherwise would have disposed of the present question, supposing it to be decided by the rule of the common law.

The present case, however, does not depend on these authorities, but on the construction of the recent act, 9 & 10 Vict. c. 95.

By the 58th section, the new Court has jurisdiction in all pleas of personal actions where the debt or damage claimed is not more than 20*l.*, "whether on balance of account or otherwise." This clause was probably introduced

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／ (a) 1 B. & Ad. 672.

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in consequence of the provisions in some of the Courts of Requests' Acts, that the act should not extend to any debt for the balance of an account originally exceeding a given sum. Be that as it may, it cannot be doubted that the clause was meant to give jurisdiction, where the debt claimed consisted of various items, either together originally not exceeding 20*l*. at the time of the suit, or being reduced to that amount by payment or an allowed set-off of other sums. We are next to consider the 63rd section, and the whole question turns upon the meaning of the term "cause of action" in that section. It is provided, that "it shall not be lawful" "to divide any cause of action, for the purpose of bringing two or more suits in any of the said Courts, but any plaintiff having cause of action for more than 20*l*., for which a plaint might be entered under this act if not for more than 20*l*., may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l*.; and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." What then is the construction of the term "cause of action?" The term "debt or damage" is not used, as it is in the passage above cited from 4 *Inst.* 266, but the more extensive term adopted is "cause of action." This term does not necessarily mean a cause of action on one single entire contract; for there may be one cause of action on several debts contracted at different times: and in far the greater number of cases, a count in indebitatus assumpsit or debt is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Favocett (a)*, and one count may be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage; and though an argument that a clause in an act of Parliament, if under-

✓(a) 11 M. & W. 336.

stood in one sense would be operative, in another inoperative, is not by any means a conclusive one; because it must be admitted, that clauses are often introduced ex abundanti cautela; yet it is of some weight, and the probability is, that the Legislature, in enacting that a cause of action should not be divided, meant a cause of action which, but for the enactment, would be divisible; and when it is considered to what abuses the narrower construction of this term would lead, which is strongly exemplified in the present case, in which 228 actions have been brought, and 3000 might have been brought, we think we may safely conclude, that the term "cause of action" ought to be interpreted "one cause of action," and not to be limited to an action on one separate contract. But, on the other hand, if the term is to comprise all debts that might be included in one count, debts for work and labour, goods sold, use and occupation, &c., though totally unconnected with each other, which might be included in one indebitatus count, would be prevented from being divided under this clause; and if indivisible, and the creditor brought an action for any part, he would virtually abandon all the remainder by the operation of the latter part of the 63rd section. In such a case, Mr. Justice *Coleridge* held, that a similar clause in the Brighton Court of Requests' Act (3 & 4 Vict. c. 10, s. 24) did not apply, the demand there being for three distinct things, for a horse sold, for rent, and for goods sold; but he made a distinction between that case and one where a debtor has a bill running from day to day; *Neale v. Ellis* (a). In such a case, though each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due the tradesman could sue for one item; yet the understanding is, undoubtedly, that it shall be united with other items and form one entire demand: and, doubtless, if after several other items were added to the first, the tradesman

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✓ (a) *Ante*, vol. 1, p. 163.

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were to bring separate actions for each, as for a distinct debt, any superior Court would deal with such proceeding as vexatious. It appears then that a great inconvenience would follow, if the term "cause of action" were interpreted to mean cause of action on one separate contract, and also, if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one indebitatus count, which, according to the modern practice, may comprise any number of separate unconnected contracts, whenever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction, some restriction must be put on the latter, and we think that we ought to hold the 63rd clause does apply, (whether to all debts which could be comprised in one description in one count as for goods sold or not, we need not now decide); but, at all events, to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand. If that demand exceed 20*l.*, it ceases to be within the jurisdiction of the County Court; and, therefore, we think that on the facts disclosed in the affidavit before us, all the debts claimed fell within that description, the total greatly exceeding 20*l.*, and, consequently, they ought not to have been separated into different suits. Whether, if the total had only amounted to 20*l.*, and the items had been separated and sued for by separate complaints, the total being within the jurisdiction of the County Court, which then could have given adequate relief, the suits could have been prohibited, is a question which need not now be discussed; but when the total exceeds that amount, and justice cannot be done in the County Court, we think that that Court has no jurisdiction, and that a prohibition ought to go.

Rule absolute.

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In re a Plaint or Suit in the County Court of
MIDDLESEX.

Between ROBINSON
and
LENAGHAN.

WILLES had obtained a rule, calling on the Judge of the County Court of Middlesex, held at Islington, and the plaintiff Robinson, to shew cause why a writ of prohibition should not issue, prohibiting the said Court from proceeding in the cause; and why the money paid by the defendant therein for debt and costs, under protest, should not be returned to him.

The rule was obtained on affidavits, which shewed that the defendant lodged within the district of the County Court of Middlesex, and that on returning on the 13th of January, A. D. 1848, to his lodgings, he found an officer of the said Court in his lodgings, and in possession of his goods under an execution. He had never received any summons, or any notice of any proceedings against him previous to the execution; but the summons had in point of fact been served by mistake at another house where he had never lived, and the officer who left it had been told that the defendant did not live, and was not known there. The defendant himself went to the County Court the next day, and complained of the facts stated above, and the Judge then made an order as follows: "It is ordered, that on the defendant's undertaking to appear and defend this case, on the merits, and, also, undertaking to bring no action against the plaintiff, or any officer of this Court, the judgment be set aside; and in default of giving such under-

An action having been brought against the defendant in the County Court, he received no notice of the proceedings, the summons having been served by a mistake at a wrong place. Judgment was given against him in his absence, proof having been given of the service of the summons to the Judge's satisfaction. The defendant made an application to the County Court under the 9 & 10 Vict. c. 96, s. 80, to set aside the judgment and execution. The Judge made an order, but upon terms to which the defendant would not consent. The defendant then paid the

amount under protest, and applied to this Court for a prohibition: *Held*, that the Judge having heard the evidence of service, and decided upon it, had jurisdiction in the matter; and that, therefore, no prohibition could be granted.

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taking on Saturday next, it is ordered, that the said judgment and execution be confirmed." The plaintiff did not give the undertaking, but paid the debt and costs under protest.

J. Brown now shewed cause. The case *In the matter of J. W. Poe (a)*, is an authority shewing that a prohibition cannot issue to an inferior Court, after the sentence of that Court has been carried into effect. It was distinctly held in that case, that a prohibition could not issue after the sentence of a Court Martial had been ratified by the King, and carried into execution. *In the matter of the Dean of York (b)*, is also an authority against this application. The 9 & 10 Vict. c. 95, s. 80, enacts, "that if on the day so named in the summons, or at any continuation or adjournment of the Court or cause in which the summons was issued, the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in Court, the Judge, upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended: Provided always, that the Judge in any such case, at the same, or any subsequent Court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause, upon such terms, if any, as to payment of costs, giving security for debt or costs, or such other terms as he may think fit, on sufficient cause shewn to him for that purpose." In this case the Judge of the County Court has had proof satisfactory to his own mind of the service of the summons, which is enough to give him jurisdiction. The inquiry whether there is satisfactory evidence of a service is entirely for the Judge. *Ferguson v. Mahon (c)*, was cited when the rule

✓ (a) 5 B. & Ad. 681; S. C. 2 D. 202.

N. & M. 636.

✓ (c) 11 A. & E. 179; S. C. 3

✓ (b) 2 Q. B. 1; S. C. 2 G. & P. & D. 143.

was moved for, but that was on another point. The decision there was, that in an action upon a judgment of the Court of Common Pleas in Ireland, the defendant, although he could not discuss the decision of that Court, if they had jurisdiction over him, might shew that they had in point of fact no such jurisdiction; and that he shewed their want of such jurisdiction by shewing that he had never been served with, nor was aware of the existence of any process in any such action, nor had he ever appeared therein.

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Willes, in support of the rule. After the case of *In the matter of the Dean of York*, it is clear, that a superior Court will interfere, by prohibition, when an inferior Court has given judgment against a defendant who has not had notice by the service of process upon him. The 80th section of the 9 & 10 Vict. c. 95, removes the necessity of the personal appearance of the defendant in Court, and enables the Court to proceed in his absence, upon proof of service; but it cannot give the Court jurisdiction where there has been no service, and no notice at all.

POLLOCK, C. B.—It would be extremely inconvenient if we were to constitute ourselves judges of the question, whether the process of an inferior Court has been duly served. That question has been left by the Legislature to the decision of the Judge of the inferior Court, to whom it more properly belongs. The 80th section gives the Judge power to proceed upon due proof being given of the service of the summons, and it makes him the sole arbitrator of the sufficiency of such proof. As soon as he is satisfied he has jurisdiction.

PARKE, B.—I am of the same opinion. The Legislature has given power to the Judge to decide on the sufficiency of service in these cases, and it has also given him power to

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rectify any injustice which may be committed, if he should be mistaken or deceived. The Judge may, upon the application of the defendant, set aside any judgment, obtained in the defendant's absence, if the defendant shews him that no summons has in fact been served. The Judge has, in the present case, made an order in pursuance of that power, and the defendant should have availed himself of it.

ROLFE, B.—The words “due proof” in the act of Parliament, do not mean that a summons shall actually have been served, but that the mind of the Judge shall be satisfied of the service. Upon being so satisfied he has forthwith jurisdiction.

Rule discharged, with costs (a).

(a) See *Zohrab v. Smith*, ante, p. 635.



PC 2 Epist. 329.

JONES v. BROWN.

The privilege of an attorney plaintiff to sue in the superior Court of which he is an attorney, is not affected by the County Courts' Act, 9 & 10 Vict. c. 95.

He is, therefore, entitled to costs, notwithstanding section 129, although he recovers less than 20*l.* in an action in the superior Court.

THIS was a rule calling upon the plaintiff to shew cause why a suggestion should not be entered on the roll to deprive him of costs under the County Courts' Act, 9 & 10 Vict. c. 95, s. 129.

It appeared upon the affidavits, that the defendant resided within the jurisdiction of the County Court of Surrey, and within twenty miles of the plaintiff, who was an attorney residing in London. That the cause of action arose within the jurisdiction of the County Court, and that the action was brought by the plaintiff as indorsee against the defendant as acceptor of a bill of exchange for 18*l.* 3*s.*

see ante. 646

G. F. Pollock shewed cause. The privilege of an attorney defendant to be sued in the superior Court is, it is conceded, taken away by the 9 & 10 Vict. c. 95; but his privilege as an attorney plaintiff still remains. None but express words will deprive an attorney of this privilege; *Board v. Parker* (a); *Dyer v. Levy* (b); *Hussey v. Jordan* (c). The 67th section, which will be relied on by the other side, cannot be said to apply to the case of a plaintiff, upon whom it depends whether or not he will come within the jurisdiction of the Court; and the words of the 129th section are too general to take away this privilege. The point, besides, has been expressly decided a few days ago by the Court of Queen's Bench, in *Lewis v. Hance* (d), and *Jones v. Savage* (e), after time taken to consider; and this Court will not review that decision. [He referred to *Armington's case* (f); *Gardner v. Jessop* (g); *Silk v. Rennett* (h); and *Wright v. Skinner* (i).]

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Pearson, to support the rule. This Court being a Court of co-ordinate jurisdiction, will not feel bound by the decision of the Court of Queen's Bench, but will treat the case as if it had first come before them; particularly as there are no means of reviewing the propriety of that decision by writ of error or otherwise. The manifest intention of the Legislature was, that no actions, within the jurisdiction of the County Court, should be brought in the superior Court, except at the penalty of costs, no matter who the plaintiff might be; and the terms of the act, it is submitted, are large enough to carry out that intention. 'A contrary construction might be productive

✓ (a) 7 East, 47; S. C. 3 Smith, ✓ (b) *Ante*, p. 645, note.

52. (f) Palm. 403.

✓ (b) 4 Dowl. 630. ✓ (g) 2 Wils. 42.

(c) Cited in note to *Wiltshire* ✓ (h) 3 Burr. 1583.

v. Lloyd, 1 Doug. 382, 4th ed. (i) 1 M. & W. 144; S. C. 4

(d) Since reported, *ante*, p. 641. Dowl. 745.

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of great mischief; as attorneys might buy up bills of exchange of small amount, for the purpose of getting costs in the superior Courts by bringing actions upon them.

POLLOCK, C. B.—I am of opinion that this rule must be discharged. There are numerous authorities which shew that general words, like these used in the present act, will not take away the privilege of attorneys to sue as plaintiffs in the superior Courts. It seems to me to be not an inconvenient mode of construing a statute, to presume that the Legislature was aware of the state of the law at the time of its being passed; and if so, what is there to shew that the Legislature intended that the words here used should have a larger or more extended signification, than similar words have been held to have in former statutes. I do not think that we should be justified in overruling a long series of cases.

PARKE, B., ROLFE, B., and PLATT, B. concurred.

Rule discharged (a).

(a) See *Lewis v. Hance*, ante, p. 641.

JONES v. BONNER and NASH.

A plaintiff suing in forma pauperis may execute a release of the cause of action to the

defendant, without the consent or knowledge of his attorney; if it be done bonà fide with a view to settle the action, and not from any intention to deprive the attorney of his costs.

The Court refused to set aside a plea of release puis darrein continuance in a pauper case, on the ground that the release had been given without the knowledge or consent of the plaintiff's attorney; where it appeared to have been executed in pursuance of a bonà fide arrangement between the plaintiff and the defendant to settle the action, and without any collusion on their part to deprive the attorney of his costs.

THIS was a rule calling upon the defendants to shew cause why a plea of release puis darrein continuance, and the deed of release therein mentioned, should not be set aside.

It appeared that the plaintiff in this case, who sued in formâ pauperis, had brought the present action against the defendant Bonner, who was his landlord, and against the defendant Nash, who acted by the former's command; for an alleged trespass to his cottage and goods. Issue had been joined, and notice of trial was given at the last Spring Assizes at Hereford. The commission day was on the 23rd of March. On the 4th of March, however, the plea of release puis darrein continuance, which it was now sought to set aside, was delivered to the plaintiff's attorney, who thereupon countermanded the notice of trial. There was some contradiction upon the affidavits on either side. The affidavit of the plaintiff in support of the rule, stated that he was sorry that he had executed the release, that Bonner had offered him a sovereign to do so, and that one Bodenham had promised to put him in a cottage. The affidavit of his, the plaintiff's, attorney, stated his belief that Bonner had fraudulently colluded with the plaintiff to deprive him, the attorney, of his costs, and that with that design the release had been executed. It also stated that he had laid out a considerable sum of money in conducting the action. On the other hand, the affidavit of the defendant Bonner denied that he had ever offered the plaintiff a sovereign to execute the release, or that Bodenham or any other person had promised the plaintiff to put him in a cottage, or that he had colluded with the plaintiff to deprive the attorney of his costs. It stated that the plaintiff had voluntarily come to him, that he had given the plaintiff a sovereign on account of the distressed state of his family, and that it was then arranged that the plaintiff should execute a release; that accordingly a release was prepared, and the plaintiff came to Bonner's house on the 28th of February, when it was read over and explained to him, and that he signed it of his own free will, and without any promise whatever being made to induce him to do so. There were other affidavits which gave the same account of the transaction.

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Martin shewed cause. The question is, whether the Court can see upon these affidavits, that the release has been given for the purpose of fraudulently depriving the attorney of his costs; because, if it was given voluntarily, and without any other intention than the bonâ fide one of putting an end to the action, the Court will not set the plea aside, although the effect may be to deprive the plaintiff's attorney of his costs. It is submitted that the facts, as they appear upon the affidavits on both sides, negative the existence of any fraudulent intention. The case of *Wright v. Burroughes (a)*, will no doubt be relied on in support of this rule; but there, there were circumstances shewing that the plaintiff was desirous of depriving his attorney of costs. If that case is to be considered as going the whole length of deciding, that under no circumstances can a pauper plaintiff, having once commenced an action, afterwards abandon it without the consent of his attorney; it is submitted that it cannot be supported, as such a decision would open a wide field of oppression to litigious attorneys, who, in conducting a pauper suit, might refuse reasonable terms, which their client would be glad to accept, for the sake of running up a large bill of costs.

Skinner in support of the rule. The usual effect of a release in an action in formâ pauperis is to deprive the plaintiff's attorney of his costs; and the parties must have been aware of that fact when they made the agreement. In *Wright v. Burroughes (a)*, the distinction between the case of an attorney of a plaintiff suing in formâ pauperis, and an attorney of an ordinary plaintiff is fully recognised. The attorney of a pauper plaintiff is appointed by the Court, and employs his skill and time and capital, upon the mere chance of succeeding in obtaining costs from the opposite party. To use the language of *Tindal, C. J.*, in

v (a) 3 C. B. 344; S. C. ante, vol. 4, p. 226. <

giving judgment in that case, he "builds all his hopes of remuneration for his expense of them and money, upon his success against his adversary;" and "a release destroys those just hopes." The Courts have, therefore, always discountenanced the settling an action by the plaintiff and defendant behind the back of the attorney.

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POLLOCK, C. B.—The circumstances of the present case differ entirely from those which existed in *Wright v. Burroughes*. In that case *Tindal*, C. J., seems to have refrained from laying down any precise rule of law upon the subject, and to have merely decided that under the particular circumstances which there existed, the Court was exercising a proper discretion in protecting the attorney. If, indeed, the attorney undertaking to carry on the action for a pauper plaintiff, were to be considered as doing so, upon the understanding that he is to be allowed to carry it on to its termination in spite of the plaintiff, that he is to be dominus litis—then the argument of Mr. *Skinner* should prevail. But I do not think that there is any such understanding. All that the Courts have done in cases of this kind, is to interfere to prevent any collusion of the plaintiff and defendant to deprive the attorney of his costs; but such interference has never been extended to a case where a fair, reasonable, and bonâ fide arrangement to settle the action has been come to between the plaintiff and the defendant. Far from setting aside any such arrangement, I should be sorry to offer any impediment in the way of its being made.

ROLFE, B.—I am of the same opinion. In *Wright v. Burroughes*, *Tindal*, C. J., begins his judgment by saying, "I will not say that cases may not arise in which it may be lawful for a pauper plaintiff to settle with the defendant, without regard to his attorney's lien." Therefore, assuming that it may be lawful to make such

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an arrangement behind the attorney's back, I think this is just one of those cases in which it should be allowed. The cause of action is such that, it appears to me highly probable, that only nominal damages would have been recovered; and so far from the defendant Bonner having colluded with the plaintiff, it appears that the plaintiff went to him and voluntarily offered to make the arrangement. I, therefore, think the Court ought not to interfere.

PLATT, B.—If a plaintiff suing in formâ pauperis were not allowed to enter into a bonâ fide arrangement to stop the further progress of the action, he would be a mere instrument in the hands of the attorney to extort money in the shape of costs from the defendant. The attorney should ascertain the character of his client before he embarks in a cause of this kind.

Rule discharged, with costs.

M'GREGOR v. FISKIN.

The defendant, who carried on business in partnership in Scotland, was arrested in England on the 17th of March, 1848, upon a capias issued under the 1 & 2 Vict. c. 110, s. 3. On the 20th of March, the Lord Ordinary made an order on the petition of the partnership firm, sequestrating their estate, appointing two meetings of creditors, and granting to the defendant a "warrant of protection" "against arrest or imprisonment for civil debt." Held, that this was a warrant of protection from arrest, under the 13th section of the 2 & 3 Vict. c. 41, (Scotch Bankrupt's Act), and not a warrant of liberation under the 17th section; and that as the defendant was in custody at the time it was granted, it was inoperative to discharge him.

THIS was a rule calling upon the plaintiff in the above action, to shew cause why a sum of 1,329*l.* 19*s.* 1*d.*, paid into Court, in lieu of special bail, should not be repaid out of Court to the defendant, or to Mr. Alexander Mitchell.

It appeared that the defendant carried on business in partnership with a Mr. James Mitchell, under the firm of Ross, Mitchell & Co., at Glasgow, and at Toronto in Upper Canada. That the Glasgow firm had become bankrupt, and that on the 20th of March, 1848, the Lord

Ordinary, upon the petition duly filed of the defendant and the said James Mitchell, made the following order:—

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The Lord Ordinary having considered this petition, with the writs produced, sequestrates the estates now belonging, or which shall hereafter belong to the petitioners, John Fiskin and James Mitchell, individual partners of the firm of Ross, Mitchell & Co., merchants, carrying on business in Glasgow, and at Toronto in Upper Canada, as partners of the said firm, and as individuals, before the date of their discharge, in terms of the act 2 & 3 Vict. c. 41, and declares the same to belong to their respective creditors, for the purposes of the said act; appoints the creditors to hold two meetings at the times and place mentioned in the petition, for the purpose of electing one interim factor, or separate interim factors, and one trustee, or separate trustees, or trustees in succession, and commissioners, as directed by the statute; remits to the sheriff of the county, where the said meetings are to be held, to proceed in manner mentioned in the statute; and grants warrants of protection to the said John Fiskin and James Mitchell respectively, against arrest or imprisonment for civil debt, until the meeting of the creditors for the election of a trustee.

(Signed) JOHN A. MURRAY,

That previously, on the 17th of March, the defendant was arrested, in London, at the suit of the plaintiff, upon a *capias* issued under the 1 & 2 Vict. c. 110, s. 3. That on the above order being made, the defendant took out a summons, returnable before *Parke*, B., at Chambers, calling upon the plaintiff to shew cause why he should not be discharged out of custody as to the above action; but that learned Judge declined to interfere. That a sum of 1,329*l.* 19*s.* 1*d.* was then paid into Court by a Mr. Alexander Mitchell, on his behalf, upon which he was discharged out of custody. The present rule was then obtained, against which,

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Willes shewed cause. The defendant was in custody before this warrant of protection was granted. It was therefore inoperative. It is not a warrant of liberation. That is an entirely different document, and power to grant which is conferred by a totally different section of the Scotch Bankrupt Act, 2 & 3 Vict. c. 41, s. 17. The present warrant is framed under the 13th section (a). It is the 17th section (b) which empowers the Lord Ordinary

(a) 2 & 3 Vict. c. 41, s. 13.
 "That where a petition is presented for sequestration by the debtor or by a company with concurrence as aforesaid, the Lord Ordinary shall forthwith issue a deliverance by which he shall award sequestration of the estates which then belong or shall thereafter belong to the debtor or company before the date of the discharge, and declare the estates to belong to the creditors for the purposes of this act; and he shall appoint a meeting of the creditors to be held at a specified hour on a specified day, being not earlier than eight and not later than fourteen days from the date of the deliverance, at a convenient place within the county where the debtor carries on or last carried on his business, (falling which, at a convenient place within the county wherein he resides or last resided,) to elect an interim factor, and another meeting to be held at a specified hour on another specified day, being not less than four weeks and not more than six weeks from the date of the deliverance, at the place fixed for the election of interim factor, to elect a trustee or trustees in succession, and

commissioners, and do the other acts herein-after provided; and he shall likewise remit to the sheriff of the county where the meeting is to be held to proceed in manner herein-after mentioned, and grant to the debtor or partners of the company (as the case may be) a warrant of protection against arrest or imprisonment for civil debt until the meeting of the creditors for the election of trustee as hereinafter provided."

(b) Sect. 17. "That the Lord Ordinary may, on application made either in the petition for sequestration or by a separate petition by the debtor, grant a warrant for liberating the debtor if in prison, after such intimation to the incarcerating creditor or his known agent as the Lord Ordinary shall deem to be just, and after hearing any objection to the granting of such warrant; and if the application be refused, it shall be competent for the debtor to make a new application for liberation, with consent of the trustee and the commissioners, and on intimation and hearing objections as aforesaid the Lord Ordinary may grant warrant to liberate."

to grant a warrant for liberating the debtor if in prison; and such warrant is only to be granted after notice given to the party, at whose suit he is in custody, of the intended application. The mere insertion of the word "imprisonment" in the order, therefore, would not make this a warrant of liberation as well as a warrant of protection from arrest; as it is manifest that two separate documents are contemplated by the statute. But even should the Court be of opinion, notwithstanding, that this order was in effect a warrant of liberation, the defendant would not be entitled to be discharged from arrest under a *capias* issued upon a Judge's order, under the 1 & 2 Vict. c. 110, s. 3. The 2 & 3 Vict. c. 41, s. 18 (a), enacts, that the "warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ* or *ad factum præstandum*, or for any criminal act." It is true, that it has been decided by Mr. Justice *Wightman* in the Bail Court, in a case between nearly the same parties (b), that a *capias* issued under the 1 & 2 Vict. c. 110, s. 3, is not "a warrant of arrest or imprisonment in *meditatione fugæ*," within the 18th section of the 2 & 3 Vict. c. 41: but that decision went upon the ground that the alleged "*fuga*" there was the contemplated return of the bankrupt within the jurisdiction of the Scotch Bankruptcy Court; and it seems to have been conceded that in some cases the *capias* might be a warrant of arrest or imprisonment in *meditatione fugæ*, within the meaning of the above section. It is submitted that that decision cannot be supported, and that a *capias*

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(a) Sect. 18. "That the warrant granting protection or liberation, or a copy thereof certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions for civil debt con-

tracted previous to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ* or *ad factum præstandum*, or for any criminal act."

✓ (b) *Ante*, p. 591.

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issued under a Judge's order cannot be a warrant of arrest in *meditatione fugæ*, or not, according to the special facts stated before the Judge when it is issued. The construction contended for cannot create any inconvenience, as by the 67th section (a), the Lord Ordinary is empowered to grant a warrant to bring the bankrupt before him for examination, wherever he may be imprisoned in England or Ireland, and for his re-transmission and re-incarceration after examination.

Aspland in support of the rule. The words of this warrant are express, that the Lord Ordinary thereby "grants warrant of protection to the said John Fiskin, and James Mitchell respectively, against arrest or imprisonment for civil debt." It is therefore a good warrant of liberation under the 17th and 18th sections, and the Court will not require the Lord Ordinary to state his authority for making the order; *Marsh v. Woolley* (b); or presume that he has acted without jurisdiction. That being so, the only question is, was the imprisonment under the *capias* in this case, an imprisonment under a warrant of imprisonment "in *meditatione fugæ*;" and the case of *M'Gregor v.*

(a) Sect. 67. "That if the bankrupt be in any part of Great Britain and Ireland other than Scotland, the Lord Ordinary may, on petition by the trustee, grant warrant under the seal of the Court of Session to all Judges, magistrates, justices of the peace, and officers of the law to apprehend and transmit him to the place of his examination, and to enforce the same, which they are hereby required to do; and if the bankrupt be in prison or custody the Lord Ordinary may grant warrant as aforesaid to magistrates and gaolers, upon receiving a duplicate of such warrant, and

an acknowledgment for the person of the bankrupt, to deliver him to the messenger or officer presenting such warrant, which they shall do accordingly; and such warrant shall be sufficient authority for the apprehension, transmission, detention, and incarceration of the bankrupt, (where necessary for his safe custody), and for his re-transmission after examination to and re-incarceration in the prison or custody from which he was delivered up."

(b) *Ante*, vol. 1, p. 84; S. C. 5 M. & G. 675; 6 Scott, N. R. 555.

Fiskin (a), which has been already cited, is an express authority that it is not.

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POLLOCK, C. B.—This rule must be discharged. The defendant was arrested on the 17th of March, but the warrant of protection granted by the Lord Ordinary was not made till three days after, and, the defendant being then in custody, was consequently inoperative for his discharge.

PARKE, B.—The Scotch Bankrupt Act, 2 & 3 Vict. c. 41, ss. 13 and 17, empowers the Lord Ordinary to grant two distinct kinds of warrants, one a warrant to protect the party from arrest, the other to discharge him out of custody, being already arrested. If this had been a warrant of liberation under the 17th section, or if the arrest had taken place subsequent to the granting the warrant of protection, the question of whether there was in this case a *meditatio fugæ*, which I thought was the point when the case was before me at Chambers, would have arisen. But that is not so. The only question is, whether this is a warrant of protection under the 13th section, or of liberation under the 17th section; and I am clearly of opinion that it is the former. The 18th section must be read, *reddendo singula singulis*, that a warrant of protection shall protect the debtor from arrest, and a warrant of liberation shall liberate the debtor from imprisonment.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

(a) *Ante*, p. 591.

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1 C. 1. 244. 831.

JONES, Assignee, &c. v. SMITH (a).

Where to an action of assumpsit by the assignee of an insolvent to recover a debt due to the estate, the defendant pleaded a traverse that the plaintiff was assignee, &c., modo et formâ, and it appeared on the trial that two assignees were appointed, but that the other one had refused to act: *Held*, that the action could not be maintained, that the defence was properly raised on the issue, and that the defendant was not bound to plead the nonjoinder in abatement.

THIS was a rule calling upon the plaintiff in the above action to shew cause why the verdict in the above action should not be set aside, and a nonsuit entered instead thereof.

The plaintiff had brought an action of assumpsit as assignee of one Adams, an insolvent debtor, for money lent and on an account stated; to which the defendant had pleaded non assumpsit, and a traverse that the plaintiff "was assignee of the debts, estate, and effects of the said Samuel Adams," modo et formâ. Issue having been joined, the cause came on for trial before the undersheriff of Berkshire, when it appeared that two assignees, of whom the plaintiff was one, had been appointed to Adams' estate, but that the other had refused to act. It was objected on the part of the defendant that the plaintiff must be nonsuited, as he sued as sole assignee, and the evidence shewed there was another assignee who had not been joined. The undersheriff, however, refused to nonsuit the plaintiff, but reserved leave to the defendant to move to enter a nonsuit, upon which the present rule was obtained; against which

Martin shewed cause. The only mode of taking advantage of the nonjoinder of a co-assignee plaintiff is by plea in abatement. In *Snelgrove v. Hunt* (b), it is true, *Abbott*, C. J., thought that it was a ground of nonsuit; but that was at nisi prius; and when the case was afterwards discussed in banc (c), the decision seems, from the judgment of *Bayley*, J., to have turned upon the fact that the declaration there was upon promises made to the assignees. The issue in this

(a) This case was decided in Hilary Term, 1848, but was omitted in its proper place.

(b) 2 Stark. 424.

(c) 1 Chitt. Rep. 71.

case was whether or not the plaintiff was assignee of Adams, not whether he was sole assignee. It is like the case of executors. There, it is clear that the only mode of taking advantage of nonjoinder of a co-executor plaintiff is by pleading it in abatement, after craving oyer of the probate; 1 *Wms. Saund.* 291 *h*. [He referred also to 7 & 8 Vict. c. 96, s. 10; *Alvon v. Furnival* (a), and *Com. Dig.* tit. "*Abatement*," (E. 13).]

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Miller, in support of the rule. There is no analogy between the case of executors and that of assignees of an insolvent debtor. A co-executor may release and pay debts without the concurrence of his co-executors; whereas one assignee cannot give a discharge of a debt due to the bankrupt's estate, but both must join; *Can v. Read* (b). The law vests the property in the assignees jointly, not in each one of them. The case of *Bloxam v. Hubbard* (c), where it was held that one of the assignees of a bankrupt not having joined in an action of trover, was only matter for a plea in abatement, is distinguishable; as there the action was in tort. *Snelgrove v. Hunt* (d) is precisely in point. [He referred to 7 & 8 Vict. c. 96, s. 10, and *Holland v. Phillips* (e). The Court referred to *Scott v. Godwin* (f); *Taylor v. Buchanan* (g); *Jones v. Yates* (h); *Wallace v. Kelsall* (i); *Gordon v. Ellis* (k).]

Cur. adv. vult.

POLLOCK, C. B., delivered judgment.—This was a rule to enter a nonsuit upon a point reserved by the sheriff of Berkshire. The question for our decision was whether an

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| (a) 1 C., M. & R. 277. | (g) 4 B. & C. 419; S. C. 6 D. & R. 491. |
| (b) 3 Atk. 695. | (h) 9 B. & C. 532; S. C. 4 M. & R. 613. |
| (c) 5 East, 407; S. C. 1 Smith, 487. | (i) 7 M. & W. 264; S. C. 8 Dowl. 841. |
| (d) 2 Stark. 424. | (k) 7 M. & G. 620; S. C. ante, vol. 2, p. 308; 8 Scott, N. R. 290. |
| (e) 10 A. & E. 149; S. C. 2 P. & D. 336. | |
| (f) 1 B. & P. 67. | |

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assignee of an insolvent debtor could sue alone upon a promise made to the debtor, there being another assignee who was not joined in the action. The action was in assumpsit, and the defendant had pleaded that the plaintiff was not assignee of the debts, estate, and effects of the insolvent, modo et formâ. It was contended on the part of the plaintiff, that any one of the assignees of an insolvent or bankrupt might sue alone, as in the case of executors; subject to a plea in abatement of the nonjoinder of his co-assignees. We think, however, that the rule which exists in the case of executors, does not apply to the assignees of a bankrupt or insolvent. Executors are seised per my et per tout, and each represents the testator, and may alone dispose of the property. Such is not the case with regard to assignees of an insolvent or bankrupt. Without going the length of *Can v. Read* (a), where Lord *Hardwicke* in substance seemed to think that the consent of both the assignees was necessary to give a valid discharge, it appears to us that this case must follow the decision in *Scott v. Godwin* (b). That was an action of covenant, brought by one assignee of a reversion. It appeared on the record that there were two assignees of the reversion, and there was no averment that the one not named was dead. The long and learned judgment of Chief Justice *Eyre* in that case is decisive of the present. He there draws the distinction between parties in actions of contract and parties in actions of tort. A contract with traders, who afterwards are bankrupts, becomes a contract with the assignees, according to the statute, precisely as if the assignees themselves had been parties to the contract. Now, it is clear, that if there be several parties to a contract, although the nonjoinder of a co-defendant is only matter for a plea in abatement, it is otherwise in the case of nonjoinder of a co-plaintiff. [His Lordship then referred to the judgment of Chief Justice *Eyre* in *Scott v. Godwin*, from which he

(a) 3 Atk. 695.

(b) 1 B. & P. 67.

read several passages.] The case of *Bloxam v. Hubbard* (a) was an action of tort. There, three out of four assignees of a bankrupt brought trover for a ship belonging to the bankrupt's estate; and the rule in actions of tort no doubt is as was there stated by Lord *Ellenborough*, when he said: "It is now too well settled to be any longer disputed in a Court of Law, that a defendant can only avail himself of an objection of this sort, viz., that all the several part-owners in a chattel have not joined in an action of trespass or of tort brought in respect to it, by plea in abatement." But the present case is an action on a contract, and in *Snelgrove v. Hunt* (b), which was cited at the Bar, Lord *Tenterden* laid it down, that, where there are two assignees of a bankrupt, both must join, in an action on a contract to both, and that one alone could not maintain an action on such a contract; and such, I believe, has ever since been the opinion of the Profession. The assignees in the present case, to whom, by the Insolvent Act, is transferred the contract with the insolvent, are in reality in precisely the same situation in that respect, as are the assignees of a reversion under the stat. of Hen. 8, which gives them the right to sue. Under these circumstances, therefore, we are of opinion that the rule must be absolute.

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PARKE, B.—The plaintiff is not assignee, unless he is sole assignee.

Rule absolute.

(a) 5 East, 407, 420.

(b) 1 Chitt. Rep. 71; S. C. 2 Stark. 424.

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1 C. 2 Rep. R. 205.

SMITH v. TATEHAM and Another.

Replication to a plea of plene administraverunt by executors, that since plea pleaded, assets had come into their hands: Held bad on demurrer.

The proper course for a plaintiff to pursue, where assets have come into the hands of executors since the commencement of the suit, and they plead plene administraverunt, is to sign a judgment of assets quando acciderint, which, if properly entered up, will reach not only whatever assets may thereafter accrue, but also all which remain in the hands of the executors unadministered at the time of the judgment.

DECLARATION in debt against the defendants as executors of W. G., deceased.

Plea, plene administraverunt præter 10*l*, and that there was a specialty debt of 110*l* due by the testator to one I S., which that sum was insufficient to satisfy.

Replication. That this action was commenced on the 5th day of January, 1847, and that after the commencement of this suit, and after the pleading of the said plea by the defendants, and before this day, to wit, on the 15th day of May, 1847, and on divers other days and times since the said plea was pleaded, and before this day, divers goods and chattels, and monies, which were of the said W. G. at the time of his death, of great value, to wit, to the amount of the causes of action so confessed in the said plea to be due to the said I S., and over and above the value and amount of the said debt of 110*l* in the said plea mentioned, came to and were in the hands of the defendants, as executors as aforesaid, to be administered; and where-with the defendants could, and ought, to have satisfied the causes of action in the declaration mentioned. Verification.

Special demurrer. That the fact of assets having come to the hands of the executors after the plea and before the replication, could not form the subject-matter of a good replication in law to the defendants' plea of plene administraverunt præter; and also that the matters set forth in the replication were not an avoidance of, and afforded no answer to, the defendants' said plea.

Needham, in support of the demurrer. The replication is bad. It is no answer to the plea of plene administraverunt præter. Upon that plea, the plaintiff was entitled to a judgment of assets, quando acciderint; and under that judgment, if properly entered up, he would get all that he

is entitled to under the replication, supposing it to be admitted as true. [He referred to *Mara v. Quin* (a); 1 *Wms. Saund.* 336, a, 6th ed.; *Chitty's Forms*, p. 511, No. 7, 5th ed.] The only precedent of a replication like the present is to be found in 3 *Wentw. Prec.* pp. 224, 5, and there Mr. *Barrow*, the pleader, who drew it, seems himself to have doubted its validity. He says, "I fear it is unprecedented, and therefore, perhaps, not to be preferred." [*Parke*, B.—Suppose the defendants were to rejoin plene administraverunt, there might be a surrejoinder similar to the replication, and the pleading might thus be indefinitely prolonged. *Rolfe*, B.—How are the defendants to answer this replication? If they suffer judgment by default, the effect would be to charge them with costs de bonis propriis; whereas, upon the plea of plene administraverunt, they are only liable de bonis testatoris.]

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The Court called on

Montague Smith to support the replication. Where assets have come to the hands of an executor after plea of plene administraverunt pleaded, but before judgment signed, the ordinary judgment of assets quando acciderint will not enable the plaintiff to touch them. The plaintiff is clearly entitled to the payment of his claim out of such assets, and the only way to get at them is by a replication like the present. The judgment of assets quando acciderint only entitles the plaintiff to assets coming into the hands of the executors after the judgment; *Noell v. Nelson* (b); and Mr. Serjt. *Williams*, in a note to that case, says, "It seems necessary to state that the assets came to the executors' hands after the judgment." The case of *Mara v. Quin* shews that the judgment of assets quando acciderint only applies to assets coming into the executors' hands after judgment; for otherwise it would have been unnecessary, in that case, to have ante-dated the judgment, as was done, in order to

(a) 6 T. R. 1.

(b) 2 *Wms. Saund.* 219.

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embrace assets come into the executor's hands after plea pleaded. The case of *Taylor v. Holman* (a) is an authority to the same effect. Lord *Kenyon*, C. J., and Mr. Justice *Ashurst*, in the former case, both seem to have thought that a form of replication like the present might be properly used. As to a judgment by default upon such a replication rendering the defendants liable to costs de bonis propriis, it is submitted that the pleadings in this case should not be struck out as in an ordinary case, and so a judgment by nil dicit pass against the defendants. Here the matter replied arises after the defendants' last pleading, and in such a case the pleadings should stand, and the judgment would be of costs de bonis testatoris. The form of judgment in *Chitty's Forms*, p. 511, No. 7, 5th ed., is not the ordinary form in use. [He referred also to 1 *Wms. Saund.* 336, a, 6th ed.; *Williams on Executors*, 1534, note (i), 3rd ed.]

Needham was heard in reply.

POLLOCK, C. B.—We are all of opinion that the replication in this case is bad. The question is, what is the effect of a judgment of assets quando acciderint. We think that such a judgment embraces not only all the assets which may have come into the executors' hands since the judgment signed, but also all the assets which may remain in their hands at the time of the judgment unadministered, no matter when received. By giving this effect to such a judgment, all the cases and precedents are reconciled. The plaintiff's counsel was incorrect in saying that assets which come into the hands of the executors between the writ and the judgment, are not affected by a judgment of assets quando acciderint. In point of fact they are, unless in the meantime they have been properly disposed of by the executors.

PARKE, B.—This replication is entirely without precedent, except the one by Mr. *Barrow*, in 3 *Wentw. on*

(a) Bull. N. P. 169.

Plead. 224, and he says that "he fears it is unprecedented, and therefore, perhaps, not to be preferred." It would be productive of the greatest inconvenience, if it were allowed, for there would be no limit to the pleadings in actions of this nature. Suppose the defendants had in the mean while duly administered the assets which had come into their hands since plea pleaded, they might so rejoin; and if they had received other assets since the rejoinder, the plaintiff might surrejoin as in the replication, and the pleadings might thus be protracted indefinitely. On the other hand, if the defendants were to suffer judgment by default, according to the ordinary course the pleadings would be all struck out, the declaration alone remaining on the record. Now, upon judgment by nil dicit in an action against executors, they become liable to costs de bonis propriis. This ought not to be the result, where they have placed upon the record what was, at the time of pleading it, a good defence to the action. To meet this difficulty we are invited to introduce a new practice, and to allow in cases of this nature all the pleadings to remain on the record; so that there might be a judgment of costs de bonis testatoris. It appears to me, however, that there is no necessity for adopting this course; as, in my opinion, the judgment of assets quando acciderint will have all the effect which could result from allowing this replication to stand. In *Mara v. Quin* (a), Lord *Kenyon*, C. J., seems first to have suggested the doubt "that the ordinary mode of entering up a judgment of assets quando acciderint was not correct; for, as on the issue of plene administravit, no evidence could be given of assets after the writ sued out, if the judgment were to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any assets, they could not be taken at all." But he seems at the same time to have pointed out the proper remedy, namely, "that

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(a) 6 T. R. 1, 10.

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the judgment in such a case ought to be entered up in such a manner as to reach all assets received by the executor after the time of suing out the writ." Mr. Justice *Ashurst* thereupon observed, "that as the plea of plene administravit was that 'the executor hath not, nor had at the time of suing out the writ, nor at any time since, any assets,' &c., he saw no objection to the plaintiff's replying to the latter part of the plea 'that the executor had assets since,' &c., if the fact were so." Such a form of replication has been used in my time; but I much doubt whether there is any necessity for it. I think that the judgment of assets quando acciderint, if properly entered up, will bind assets which may then or thereafter be in the hands of the executors to be administered, irrespective of the fact whether they have been received by the executor before or after the signing of such judgment. It would, therefore, reach the assets to which this replication is pleaded: and the replication is therefore bad.

ROLFE, B.—I am of the same opinion. There is no authority to shew that the first perception of the assets by the executors must have been at a time posterior to the judgment. Assets which, at the time of the judgment, are unadministered, in the hands of the executor, are liable equally with those which afterwards may come into his hands. If the Court in *Mara v. Quin* (a) had not too readily acceded to the suggestion of ante-dating the judgment, the legal effect of the judgment, if properly entered up, would have accomplished all that was purposed by the amendment. I, therefore, think that the replication in this case was unnecessary and bad.

PLATT, B., concurred.

Leave to amend; otherwise judgment for defendants.

(a) 6 T. R. 1, 10.

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GRAHAM and Another v. INGLEBY and GLOVER.

8 C. 1. 2. 651.

A RULE had been obtained calling upon the defendant Glover to shew cause why an order of a learned Judge at Chambers should not be rescinded, and why the interlocutory judgment thereby ordered to be set aside, should not be restored.

The provision in the 4 Anne, c. 16, s. 11, "that no dilatory plea shall be received" unless verified by affidavit, is introduced for the sole benefit of plaintiffs; and a plaintiff may therefore waive, if he so chooses, an irregularity in, or the omission of, any such affidavit.

It appeared upon the affidavits that the above action having been brought, the defendant Glover, on the 30th of July, 1847, pleaded in abatement that he was an attorney of the Court of Queen's Bench, and not an attorney of the Court of Exchequer. The plea was accompanied by the usual affidavit of verification, which was sworn before a commissioner in the country, the jurat of which was in the following form, omitting the words "before me:"—"Sworn at Manchester, in the county of Lancaster, this 29th day of July, 1847. Samuel H. Buckley, a commissioner." On the 31st of July, the plaintiffs having traversed the plea, and added a similiter, delivered the issue, with notice of trial for the Summer Assizes for Lancashire. The defendant, on the 4th of August, returned the issue, having struck out the similiter, and delivered a demurrer to the replication. The plaintiffs, thereupon, took out a summons before a Judge at Chambers, to set aside the demurrer as frivolous, which was on the hearing dismissed, with costs. They then took out a summons for time to join in demurrer until the 5th day of Michaelmas Term. On the 5th of November, they obtained an order for four days' further time to join in demurrer. On the 8th of November, they signed judgment as for want of a plea, on the ground of the defect in the jurat of the affidavit verifying the plea in abatement. That judgment having been set aside by order of a learned Judge at Chambers, the present rule was obtained, against which,

An affidavit sworn before a commissioner, omitting the words "before me" in the jurat, is bad.

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Martin shewed cause. The defect in the jurat is an irregularity merely, and not a nullity. The words "before me" are not necessary where the affidavit is sworn before a Judge at Chambers; *Empey v. King* (a); and there seems to be no reason why they should be required in an affidavit before a commissioner. [*Parke, B.*, referred to *Reg. v. The Inhabitants of Bloxham* (b).] There, the stat. 13 Geo. 2, c. 18, s. 5, expressly prohibits a certiorari from being issued, unless the notice to the justices required by the statute be duly proved upon oath to have been given. Here, the stat. 4 Ann. c. 16, s. 11, only requires "that no dilatory plea shall be received in any Court of record, unless the party offering such plea do by affidavit prove the truth thereof," &c. The enactment is for the benefit of the plaintiffs, and they may therefore waive it. [*Platt, B.*—Suppose there had been no affidavit whatever, and the plaintiffs had proceeded to trial, and a verdict had been given for the defendant, could the plaintiffs afterwards sign judgment as for want of plea; and yet the argument on the other side must go that length.] Where under the old law, a defendant had, after imparlance, pleaded a plea in abatement, the plaintiff, if he replied to the plea instead of demurring, cured the defect; 2 *Wms. Saund.* 2 e, n. (2), 6th ed. In *Garratt v. Hooper* (c), *Taunton, J.*, is reported to have held, that a plea in abatement not verified by affidavit, was a nullity, which could not be waived; but that decision, it is submitted, cannot be supported, and it is in direct opposition to the case of *Horsfall v. Matthewman* (d), where it was held that the plaintiff could not, after a plea in abatement, sign judgment, because the affidavit was sworn before a commissioner who was the defendant's attorney. [*Alderson, B.*, referred to *Pether v. Shelton* (e), note.]

(a) 13 M. & W. 519; S. C. vol. 2, p. 168.

ante, vol. 2, p. 375. See also (c) 1 Dowl. 28.

Thorne v. Jackson, 3 C. B. 661.

(d) 3 M. & S. 154.

(b) 6 Q. B. 528; S. C. ante,

(e) 1 Stra. 638.

The Attorney General and Burnie in support of the rule. The case of *Reg. v. The Inhabitants of Bloxham*, shews that the omission of the words "before me" in the jurat of an affidavit, sworn before a commissioner, is fatal. The statute requires an affidavit of verification, with every plea in abatement; and a statutable requisition like the present, cannot be waived; *Goodwin* q. t. v. *Parry* (a); *Roberts* v. *Spurr* (b); *Taylor* v. *Phillips* (c). The case of *Garratt* v. *Hooper* is an express authority in favour of the plaintiffs. [They referred also to *Davidson* v. *Chilman* (d).]

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POLLOCK, C. B.—This rule must be discharged. The omission of the words "before me" in the jurat, render the affidavit bad. It is, therefore, the same as if there were no affidavit.

With respect to the other point, suppose, as the case has been put by my Brother *Platt* in the course of the argument, that there had been no affidavit whatever, and the plaintiffs had replied, joining issue, and a trial had taken place, and a verdict had been given in favour of the defendant, and judgment entered up; could the whole proceedings have been set aside for want of the affidavit. I think clearly they could not. The question is, what is the true meaning of the statute of Anne. In my opinion the act had no public policy for its object in requiring an affidavit, but solely the protection of plaintiffs against the delivery and effect of dilatory pleas. It says, "that no dilatory plea shall be received in any Court of record," unless verified by affidavit. If a plaintiff chooses to waive that provision, which is introduced for his benefit, he cannot afterwards sign judgment as for want of a plea. The case of *Reg. v. The Inhabitants of Bloxham* (e), which

(a) 4 T. R. 577.

(b) 3 Dowl. 551.

(c) 3 East, 155.

(d) 1 Bing. N. C. 297; S. C.

1 Scott, 117.

(e) 6 Q. B. 528; S. C. *ante*,
vol. 2, p. 168.

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has been cited, was a criminal proceeding, and there was no party there who could give consent.

PARKE, B.—I am of the same opinion. I think we are bound, according to the cases of *Reg. v. The Inhabitants of Blozham*, and *Reg. v. The Inhabitants of Norbury* (a), to hold that an affidavit sworn before a commissioner, omitting the words “before me” in the jurat, is bad. The case of *Empey v. King* (b), which has been referred to, is distinguishable, as there the affidavit was sworn before a Judge at Chambers. The present affidavit, therefore, is equivalent to no affidavit.

As to the other point, the question is, whether the enactment in the statute of Anne is for the sole benefit of plaintiffs; for, if so, the maxim applies, “*Quilibet potest renunciare juri pro se introducto*.” I think that it is, and that it has no reference whatever to other suitors, or the rest of the Queen’s subjects. It follows, therefore, that although an affidavit is so defective as to amount to no affidavit at all, a plaintiff may waive the benefit of his right, and join issue on the plea, and proceed to trial; and if he does so, he cannot afterwards avail himself of the provisions of the statute. So, if he were to demur to the plea, he would equally waive the benefit of the provisions of the statute. If it were not so, great inconvenience, as already pointed out, must ensue. Suppose the plaintiff joined issue, and a verdict was found against him; or demurred, and the Court gave judgment of respondeat ouster; in what condition would the defendant be, if the plaintiff could afterwards treat the plea as a nullity, and sign judgment? The case of *Goodwin q. t. v. Parry* (c) is distinguishable, as there the decision proceeded on the ground that the enactment was for the public benefit; whether rightly or wrongly

✓ (a) 6 Q. B. 534, n.

ante, vol. 2, p. 375.

✓ (b) 13 M. & W. 519; S. C.

(c) 4 T. R. 577.

so decided, we need not now stop to inquire. So in *Taylor v. Phillips* (a), where process was served on a Sunday; it is for the public benefit that Sunday should be sanctified. I cannot agree with that part of the judgment of *Taunton, J.*, in *Garratt v. Hooper* (b), where he says, that the Court are bound to treat a plea in abatement as a nullity, if unaccompanied by an affidavit, although the plaintiff is willing to accept it.

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ALDERSON, B.—I am of the same opinion. There are cases in which an action cannot be commenced, until after notice of action has been given. That is a requirement by statute; but if a plaintiff went to trial, and the defendant did not then object to the want of notice, could he afterwards do so, and set aside the whole proceedings? Clearly he could not. With regard to *qui tam* actions, interest reipublicæ, that in general no person should sue except the party having an interest in the subject-matter; but the Legislature has said, that under particular statutes popular actions may be brought. The principle upon which the decisions in such cases proceed, whether well founded or not is immaterial, is, that an individual cannot waive a matter in which the public have an interest.

PLATT, B., concurred.

Rule discharged.

✓ (a) 3 East, 155.

✓ (b) 1 Dowl. 28.

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HILLS and Others v. HAYMEN.

The defendant obtained a rule to plead, amongst other pleas, fourthly, "as to 100*l.* parcel, &c., that, before the commencement of the action, the defendant indorsed and delivered to the plaintiffs a bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*" The plea delivered as the fourth plea was, as to 100*l.* parcel, &c., that the defendant "for and on account of" the said sum of 100*l.*, indorsed to plaintiffs a bill of exchange, &c. for 100*l.*, drawn by defendant upon and accepted by one T. J., and that the plaintiffs took and received the said bill of exchange "for and on account of" the said sum, parcel, &c., and that the defendant had no due notice of the non payment of the said bill of exchange: *Held*, that the plaintiffs were entitled to sign judgment as for want of a plea.

A RULE had been obtained calling upon the defendant to shew cause why an order of a learned Judge at Chambers, setting aside a judgment signed in the above cause, should not be rescinded.

It appeared upon the affidavits, that the plaintiffs having brought the above action to recover the amount of a bill of exchange for 100*l.* against the defendant as drawer, with counts for money paid, and on an account stated, the defendant obtained a rule to plead several matters: namely, first, a traverse of the making of the bill; secondly, no notice of dishonour; thirdly, as to the second and third counts, never indebted; and fourthly, "as to 100*l.*, parcel, &c., that, before the commencement of this action, the defendant indorsed and delivered to the plaintiffs a bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*" The fourth plea delivered under this rule was as follows:—As to the said sum of 100*l.* parcel, &c., that he, the defendant, "for and on account of" the said sum of 100*l.*, indorsed and delivered to the plaintiffs a certain bill of exchange for 100*l.*, drawn by the defendant upon, and accepted by, one T. Jackson; and that the said plaintiffs took and received the said bill of exchange "for and on account of" the said sum, parcel, &c. It then averred that the defendant had not due notice of the non payment of the said bill of exchange so taken by the plaintiffs as in this plea mentioned. The plaintiffs having signed judgment as for want of a plea, an order was made by a learned Judge at Chambers to set the judgment aside. The present rule having been then obtained,

Horn shewed cause. The plea pleaded is substantially

the same as that allowed by the rule. It shews that the bill of exchange was received in satisfaction, because it shews that the plaintiffs, by their laches, caused it to operate by way of satisfaction. But even if there were a variance between the plea allowed and the plea pleaded, the proper course for the plaintiffs to have pursued was to have procured the rule to be amended at the expense of the defendant; or to have moved the Court or a Judge to have had the plea struck out as not being in conformity with the rule to plead; and they ought not to have signed judgment. This is not like the common case of a defendant being under terms to plead issuably, and pleading a non issuable plea. There judgment is properly signed, because the defendant breaks his engagement, and, by his improper pleading, tends to embarrass and delay the plaintiff. Here, there is nothing more than an unintentional mistake in describing the plea intended to be pleaded. The case of *Holliday v. Bohn* (a) is in point. That was a declaration in debt, containing two counts. The defendant had obtained a rule to plead first, as to the first count, a traverse of the making of the promissory note therein mentioned; secondly, as to the first count, payment; and thirdly, as to the second count, *nunquam indebitatus*. By mistake, he delivered with the pleas to the first count, *non assumpsit* to the second count, instead of *nunquam indebitatus*. The plaintiff having signed judgment, the Court set it aside, saying that the case "differed from that of a defendant who delivers several pleas without having obtained a rule to plead several matters." [*Rolfe*, B.—It is not clear that the defendant in that case required any rule to plead the plea of *nunquam indebitatus*, as it was the only plea to the second count. *Platt*, B.—Suppose the defendant had obtained a rule to plead four several matters, and had pleaded four matters totally different, could not the plaintiff in such a case have

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(a) 3 M. & G. 115; S. C. 3 Scott, N. R. 496.

1848. signed judgment?] Yes, but there the defendant would
 { HILLS be in the same situation as if he had obtained no rule at
 and Others all to plead. [He referred to *Badman v. Pugh* (a), and
 v. *Bailey v. Baker* (b).]
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Bramwell, in support of the rule, was not called upon.

PER CURIAM (c).—The Judge's order must be rescinded. The present case is distinguishable from that of *Holliday v. Bohn* (d), for the reasons given by the learned reporters, in a note to that case (e).

Rule absolute (f).

- ✓ (a) 6 Scott, N. R. 150; S. C. 5 M. & G. 381; 2 Dowl. 907, N. S. *Platt*, B.
 ✓ (d) 3 M. & G. 115; S. C. 3 Scott, N. R. 496.
 ✓ (b) 9 M. & W. 769; S. C. 1 Dowl. 891, N. S. (e) 3 M. & G. 115, a.
 (c) *Parke*, B., *Rolfe*, B., and (f) The judgment was subsequently set aside upon terms.

S. C. 2 L. R. 325.

WINTERBOTTOM v. LEES.

The plaintiff, on the last day for entering the cause for the assizes, being also the last day within which the defendant had to rejoin, inserted a rejoinder for the defendant, made up the record, and entered the cause for trial.

THIS was a rule calling upon the plaintiff to shew cause why the issue, notice of trial, nisi prius record, and the trial of this cause, should not be set aside, with costs.

It appeared upon the affidavits that the defendant, who was under terms of rejoining gratis, on the 25th of March, 1848, received a replication of the Statute of Limitations to a plea of set-off, with a demand of a rejoinder within twenty-four hours. The defendant, on the 29th of March, a little before nine o'clock in the evening, delivered a re-

Subsequently, on the same evening, but after the office for entering the records was shut, the defendant delivered a rejoinder differing slightly in form, although in substance the same as that which the plaintiff had inserted for him. The cause was tried, the defendant not attending, and a verdict given for the plaintiff. The Court set aside the record and trial.

Rejoining gratis only means rejoining without a rule to rejoin, and a defendant has still four days' time within which to rejoin.

joinder, traversing the Statute of Limitations. The venue in the action was laid in Cheshire, and the commission day for Chester was the 29th of March; and by the practice of the office, records were required to be passed before three o'clock in the afternoon of the commission day, at which hour the office closed. The plaintiff, on the morning of that day, inserted a rejoinder for the defendant, traversing the Statute of Limitations; joined issue upon it, made up the record, and entered the cause for trial. The rejoinder thus inserted was in the following form: "that the said causes of set-off, and every part thereof, did arise and accrue to the defendant within six years before the commencement of this suit." The rejoinder delivered by the defendant was, "that the said debts and causes of set-off in the said last plea mentioned, did arise and accrue within six years next before the commencement of this suit." Notice of trial was given to the defendant, but he did not appear at the trial, and a verdict was given for the plaintiff. The above rule having been obtained, on the ground that there was a variance between the issue as made up, and the rejoinder as delivered; and also on the ground that the defendant was not bound, under the terms of rejoining gratis, to rejoin within twenty-four hours;

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Welsby and *Hoggins* shewed cause. The defendant was bound to rejoin within twenty-four hours after demand. It is laid down in *Lush's Pract.* p. 396, that the term of rejoining gratis means rejoining within twenty-four hours after demand. [*Rolfe*, B.—That is not so. The case of *Adkins v. Anderson* (a) shews that rejoining gratis only means rejoining without a rule for that purpose, but that the defendant has still four days within which to rejoin. *Platt*, B.—It is so laid down by Mr. *Tidd* in his *Practice*, p. 472, 9th ed.] At any rate, the variance between the re-

✓ (a) 10 M. & W. 12; S. C. 1 Dowl. 877, N. S. ✓

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joinder as inserted in the issue, and the rejoinder delivered, is immaterial. The defendant was bound to rejoin that day, and had the plaintiff waited till the rejoinder was delivered, he would have been too late to have tried the cause at those assizes. [*Rolfe*, B.—What the plaintiff entered was not the record. *Parke*, B.—It was not a transcript of the pleadings.] It raised the same issue. The plaintiff may add a similiter, and make up the record by anticipation, if he does it correctly. [*Parke*, B.—Here he has not done so.]

Martin, in support of the rule, was not called upon.

PER CURIAM (a).

Rule absolute.

(a) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

S.C. 1. 1. 1. 770.

WELBY v. BROWN (a).

A party succeeding on an issue which entitles him to the *postea* and the general costs of the cause, is entitled to the costs of all witnesses attending to prove that issue, whether their evidence applies to any other issue or not. But the opposite party is entitled only to the costs of such

A RULE had been obtained, calling on the defendant to shew cause why the Master should not review his taxation in the above cause.

The facts of the case sufficiently appear in the judgment of the Court.

Watson and *Hugh Hill* shewed cause.

Martin, in support of the rule.

Cur. adv. vult.

(a) This case was decided in Hilary Term last.

witnesses as attend solely to prove the issue on which he succeeds, and if they also attend to prove an issue, on which he fails, he is not entitled to any costs in respect of them.

POLLOCK, C. B.—In this case a rule had been obtained by Mr. *Martin*, calling on the defendant to shew cause why the taxation of the Master, who taxed the costs, should not be reviewed; and cause was shewn against that rule in Michaelmas Term last. It was an action on an attorney's bill for 63*l.* and upwards. The defendant pleaded, first, never indebted; secondly, the Statute of Limitations; and thirdly, that no signed bill had been delivered in pursuance of the statute. The plaintiff recovered, on the first issue, 18*l.* 10*s.* 3*d.*, and the defendant had a verdict as to the residue; on the second issue, the plaintiff had a verdict; and on the third issue, the verdict was found for the defendant.

The defendant is entitled to the *postea*, and to the general costs of the cause. He is, therefore, entitled to the costs of all witnesses attending to prove the third issue, whether their evidence applies to any other issue or not. As to those who attended only to reduce the plaintiff's demand on the first issue, he is entitled to the costs in respect of them also, unless the same attended also to negative the second issue.

The plaintiff, on the other hand, is entitled to the costs of those witnesses who attended solely to prove those issues found for him; that is to say, his demand of 18*l.* 10*s.* 3*d.* under the first issue, and also the second issue, both or either of them. We have, therefore, referred to Master *Walker* to certify whether he has so taxed the costs in this case, and we find he has done so. The rule must, therefore, be discharged, with costs.

Rule discharged.

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s.c. - 2 Exch. 196.

KERFOOT, Executor v. EDWARDS.

The rule that where oyer is demanded, the defendant has the same time to plead after it is granted, as he had at the time of the demand, applies in respect of pleas in abatement as well as of pleas in bar.

THIS was a rule calling upon the plaintiff to shew cause why the judgment signed in the above cause should not be set aside.

It appeared upon the affidavits that the above action was brought by the plaintiff, as executor of one James Kerfoot, deceased. The declaration, which was in debt, contained the usual profert of the letters testamentary; and was delivered on the 7th of April, 1848. On the following day, the 8th of April, the defendant demanded oyer and a copy of the letters testamentary, which was granted on the 11th of April. On the 13th of April, the defendant delivered a plea in abatement. The plaintiff thereupon took out a summons before a learned Judge at Chambers, calling on the defendant to shew cause why the plea in abatement should not be set aside, on the ground that it was pleaded more than four days after the delivery of the declaration; but the Judge declined to make any order. The plaintiff then gave the defendant notice that he should treat the plea as a nullity, and sign judgment after the time for pleading in bar should have expired. Accordingly, on the 20th of April, the plaintiff signed judgment; and the present rule having been obtained,

Crompton shewed cause. It is submitted that the rule that a defendant craving oyer has the same time to plead after it is granted, as he had at the time of demanding it, does not apply to cases where the defendant pleads in abatement. The defendant is bound to plead a plea in abatement within four days of the delivery of the declaration. In *Barrow v. Bell* (a), which was an action by an executor, the declaration was delivered on the 30th of

(a) Trinity Term, 1846, not reported. *Crompton* stated the facts from his brief, having been counsel in the cause.

May, 1846; and on the 3rd of June, demand of oyer of the letters testamentary was made, which was given a few minutes before nine o'clock on the night of the 6th of June, which was a Saturday. A plea in abatement was delivered on the Monday morning, the 8th of June, before eleven o'clock; and, consequently, within time, if the defendant had as much time for delivery of the plea after oyer was granted, as he had at the time of demanding it. The plaintiff, however, signed judgment on the 12th of June as for want of a plea, and the Court refused to set it aside. [*Parke, B.*—The decision there probably proceeded on the ground that the four days within which a plea in abatement must be pleaded, were to be reckoned, inclusive both of the first and last days. That was the old rule; but by Reg. Gen., Hilary Term, 2 Wm. 4, r. VIII, it is provided, "that in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day;" and we decided in *Ryland v. Wormald* (a), that that rule applied to the four days within which pleas in abatement must be delivered. In refusing to set aside the judgment in the case of *Barrow v. Bell*, the Court was probably unmindful of this rule, and of the decision in *Ryland v. Wormald*; not that they thought that where oyer was demanded, there was any different rule prevailing in respect to pleading in bar and pleading in abatement.]

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Welsby, in support of the rule, was stopped by the Court.

PER CURIAM.

Rule absolute.

(a) 2 M. & W. 393; S. C. 5 Dowl. 581.

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10 22 Feb. 216.

REGINA v. RENTON.

A defendant in execution under a writ of extent at the suit of the Crown, who has been taken from prison under an order of the commissioners of excise for the purpose of giving evidence, without any writ or other process being issued, and after giving such evidence, has been re-conveyed back to prison, is not entitled to his discharge; as even assuming it to amount to a voluntary escape, the Crown had power to re-take and detain him in custody under the original writ.

A RULE had been obtained, calling upon the Attorney General, the commissioners of excise, and the sheriff of the county of Surrey, to shew cause why the writ of extent issued in the above cause should not be quashed (*a*), and the defendant be discharged out of custody.

It appeared upon the affidavits, that, on the 31st of January, 1848, the defendant had been taken into custody by the sheriff of Surrey, and lodged in the county gaol, under a writ of extent issued at the suit of the Crown against the defendant, for certain penalties incurred by a breach of the excise laws. On the 12th of February, being still in custody, he was, by order of the commissioners of excise, taken out of the precincts of the gaol, and brought before a jury for the purpose of giving evidence in the matter of such extent. After having given evidence he was taken back to the gaol, and had ever since remained there in custody. No writ of habeas corpus, or any other legal process had been obtained for the purpose of bringing him before the jury. The present rule having been obtained,

The *Attorney General* (with whom were *W. H. Watson* and *J. P. Wilde*) shewed cause on behalf of the Crown. The facts stated in the affidavits might probably amount to a voluntary escape in law, if the writ, under which the defendant was in custody, was issued at the suit of a subject; but here the writ is at the suit of the Crown, and no negligence on the part of its officers can affect the rights of the Crown. In *Sheffield v. Ratcliffe* (*b*), it is laid down, that "it is no reason that the negligence of his officers, and perhaps, their

(*a*) On the ground that the writ was made returnable in Vacation; but on the 5 & 6 Vict. c. 86, s. 8, being referred to, this

portion of the rule was abandoned.

(*b*) Hob. 347.

compact and combination with the adverse party, should defeat the King." To the same effect are the cases of *The Attorney General v. Chitty* (a), and *The Attorney General v. Walmsley* (b). But even if it were a voluntary escape, the defendant might be retaken under the original extent, the process being at the suit of the Crown. An *Anonymous case* in *Savile* (c), is an express authority in favour of this view. There "it was said by *Fanshaw*, remembrancer of the Queen, that if one should be in execution at the suit of the Queen in the Fleet, the guardian of the Fleet could suffer him to go to his counsel with his keeper; but it is otherwise if one is in execution at the suit of a common person. And the reason is, for this, that if he who is in prison in execution for the Queen should happen to escape, the guardian for the Queen can retake him; it is otherwise in the case of a common person." [He cited also *Dyer* (d); *Sir Edw. Coke's case* (e); *Manning's Exch. Prac.* 32.]

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Lush and *J. W. Rogers* in support of the rule. The rule that the Crown is not to be prejudiced by the negligence of its officers, has never been held to apply to cases where the *person* of the subject is concerned. But in the present case, the escape is not the act of the officer, but of the Crown itself, by whose order he was taken before the jury. The question is, whether the Crown has any power to do this, without the leave of a Court of law; and it is submitted, it has not. In *Dyer* (f) it is said, "the command of the treasurer and chancellor are not sufficient warrant to license one condemned in execution to go with a keeper, or otherwise, at large, for the Queen herself could not do that; as was holden by the opinion of all the justices of both benches, in the time of Queen Mary." As to the

(a) *Parker*, 37, 48.

(b) 12 M. & W. 179.

(c) Page 29.

(d) 3 *Dyer*, 365, a.(e) *Godbold*, 289, 298.(f) 3 *Dyer*, 297, a.

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Anonymous case which has been cited from *Savile* (a), the proceeding there was *ex gratiâ* to the debtor. [They referred also to *Filewood v. Clement* (b); *Thurland's case* (c); and 2 *Inst.* 187.]

The *Attorney General* was heard in reply.

POLLOCK, C. B.—Some points have been discussed, which if it had been necessary to decide, might have required a more solemn and deliberate judgment, as the authorities with reference to them are conflicting. But the simple question which we have to pronounce upon at present is, whether a defendant in execution under a writ of extent, who has been taken from prison for a time under an order of the commissioners of excise, for the purpose of giving evidence, is therefore entitled to his discharge; and I think that he is not. The *Anonymous case* (a) which has been cited from *Savile*, is a satisfactory authority, that if a person who is in prison at the suit of the Queen should escape, the guardian for the Queen can retake him. There is no doubt or conflict of opinion upon that case, so far as it decides this point. The defendant, therefore, is in legal custody, and is not entitled to be discharged.

PARKE, B.—I am of the same opinion. In the case in *Savile* (a) a clear distinction is taken between the rights of the Crown in this respect, and the rights of the subject. In the one case, the execution is not satisfied by the voluntary escape; in the other, it is.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

(a) Page 29.
 (b) 6 Dowl. 508.

(c) 2 Dyer, 162, b.

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RYALLS v. BRAMALL and Another, Executors, &c. (a).

1C 1- Epk R-734

DECLARATION in assumpsit against two executors on a bill of exchange accepted by their testator, Joel Buxton. In the commencement of the declaration, it was stated that the defendants had been summoned to answer the plaintiff by virtue of a writ of summons issued on the 14th of May, A. D. 1847.

Plea. And the defendants, by E. T., their attorney, pray judgment of the said writ and declaration, because they say that the said testator, heretofore to wit, on the 13th of December, A. D. 1846, made his last will and testament, and thereby constituted and appointed the defendants, and one Charlotte Buxton, executors and executrix thereof; and afterwards, to wit, on the 16th of December, A. D. 1846; the said Joel Buxton died; and the defendants, and the said Charlotte Buxton, afterwards, to wit, on the 23rd of January, A. D. 1847, duly proved the said will, and took upon themselves the burthen of the execution thereof; and the said Charlotte Buxton then administered divers goods and chattels, which were of the said Joel Buxton at the time of his death, as executrix of the last will and testament of the said Joel Buxton. And the defendants bring here into Court the letters testamentary of the said Joel Buxton, deceased, which fully prove that the defendants, and the said Charlotte Buxton, were and are executors and executrix of that will, and have the execution thereof, &c. And the defendants further say, that the said Charlotte Buxton is still living, and at the time of the commencement of this suit was and still is resident within the jurisdiction of this Court, to wit, at

A date may be assumed to be material upon demurrer, when, if truly stated, it would support the pleading.

The Court is presumed to have the writ of summons before them on demurrer.

Assumpsit against the defendants as executors of J. B. Plea in abatement of the non-joinder of a co-executrix. The plea stated that the defendants and C. B. were appointed executors and executrix; that the defendants and C. B. duly proved the will, and took upon themselves the burthen of the execution thereof, and that C. B. then administered divers goods and chattels which were of J. B. at the time of his death, as executrix of the last will and testament of the said J. B. Held, on demurrer, that the allegation

(a) This case was decided in Hilary Term last.

of probate was only inducement to the averment of administration, and did not render the plea double.

Duplicity in a plea in abatement can only be taken advantage of on special demurrer.

1. Pratt R. 360

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Tytherington, in the parish of Prestbury, in the county of Chester. And this the defendants are ready to verify, wherefore, inasmuch as the said Charlotte Buxton is not named as a defendant in the said writ and declaration, the defendants pray judgment of the said writ and declaration, and that the same may be quashed.

Special demurrer, on the ground that it is not alleged that Charlotte Buxton proved the will of Joel Buxton, or took upon herself the burthen of the execution thereof; or that Charlotte Buxton administered the goods and chattels which were of Joel Buxton at the time of his death, as executrix of the last will and testament of Joel Buxton, before the commencement of this suit.

Blackburn, in support of the demurrer.

Whitehurst, contra.

The following authorities were referred to in the course of the argument; *Mara v. Quin* (a); *Fisher v. Ford* (b); *Nichols v. Haywood* (c); *Tucker v. Webster* (d); *Allen v. Hopkins* (e); *Faithfull v. Ashley* (f); *Com. Dig.* tit. "Pleader," (E. 6); tit. "Abatement," (F. 10); 2 *Wms. Exors.* 1518, 4th ed.; *Plowd. Com.* 33; *Wankford v. Wankford* (g); *Alexander v. Maxman* (h); and *Swallow v. Emberson* (i).

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court (k), (after stating the pleadings).—The question is, whether the plea is good?

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| (a) 6 T. R. 1. | (f) 1 Q. B. 183; S. C. 4 P. |
| (b) 12 A. & E. 654; S. C. | & D. 524; 9 Dowl. 555. |
| 4 P. & D. 347. | (g) 1 Salk. 299. |
| (c) 1 Dyer, 59, a. | (h) Willes, 40. |
| (d) 10 M. & W. 371; S. C. | (i) 1 Lev. 161; S. C. 1 Keb. |
| 1 Dowl. 960, N. S. | 865. |
| (e) 13 M. & W. 94. | (k) In Hilary Term last. |

Several objections were made to it. The principal one was, that the facts mentioned in the plea were not stated to have occurred before the commencement of the suit, which is necessary since the new rules of pleading, as the plea speaks as of the day of its date, not the date of the declaration; *Tucker v. Webster* (a).

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We think this objection is not well founded, for the dates may be assumed to be material upon demurrer, when, if they were truly stated, they would support the plea, according to the doctrine laid down in *Nightingale v. Wilcoxon* (b), and since in the late case of *Whittaker v. Harold*, in error; and we must, therefore, intend that the administering of the assets, which is the material allegation, was before the commencement of the suit, the date of the writ being stated; and the Court, it seems, is always presumed to have it before them on demurrer; *Shepherd v. Shepherd* (c), per *Tindal*, C. J.

The other objection of duplicity we do not consider as sustainable. The allegation of the probate is only inducement to the substantial averment that she administered, which follows, and does not render the plea double; and if it did, the duplicity is not pointed out on special demurrer. Duplicity at common law is only cause of special demurrer; and though the statutes 27 Eliz. c. 5, and 4 Ann. c. 16, do not apply to pleas in abatement, we are not aware that the rule of the common law does not.

Judgment quod breve cassetur.

✓ (a) 10 M. & W. 371.
 (b) 10 B. & C. 202.

✓ (c) *Ante*, vol. 3, p. 200.

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J.C. 1. 422 R. 711.

HIGGS v. MORTIMER (a).

To a declaration in covenant, stating that the defendant was summoned to answer the plaintiff by virtue of a writ of summons, dated the 21st of March, 1843, the defendant pleaded, first, in bar of the further maintenance of the action, that the first writ with which he had been served was a writ of pluries summons, dated the 21st of October, 1846, and that the said writ was not issued within one calendar month after the expiration of any preceding writ, and no proceedings had been had towards outlawry. That the cause of action did not accrue within twenty years next before

DECLARATION in covenant for the non payment of a sum of money under a marriage settlement. It stated, that the defendant had been summoned to answer the plaintiff, by virtue of a writ issued on the 21st day of March, A. D. 1843.

First plea, in bar of the further maintenance of the action, that the first and only writ with which the defendant had been served in this action, and according to the exigency of which he entered an appearance in this action, was a writ of pluries summons, dated, the 1st of October, 1846. That such writ was not issued within one calendar month next after the expiration of any preceding writ of summons in this action, including the day of such expiration. That no proceedings to or towards outlawry have been had upon any of the writs in this action. That the cause of action in the declaration mentioned, did not accrue at any time within twenty years next before the date and issuing of the said writ of pluries summons in this plea mentioned to have been issued on, and bearing date, the 21st of October, 1846, and with which the defendant was served as aforesaid; and that the said last mentioned writ was issued more than ten years next after the end of the session of Parliament, holden in the third and fourth years of the reign of his late Majesty King William the Fourth.

(a) Decided in Hilary Term last.

the date of such writ; and that the writ was issued more than ten years after the passing of the 3 & 4 Wm. 4, c. 42. Secondly, a similar plea, setting out the various writs in continuation of previous writs, and stating that one of them, dated the 28th of March, 1846, was not entered of record within one calendar month next after the expiration thereof, including the day of such expiration, according to the form of the statute, &c. : *Held*, on special demurrer, that the pleas were bad, first, for not alleging positively that the cause of action accrued more than twenty years before the commencement of the suit; and secondly, for being improperly pleaded to the further maintenance of the action.

Although the stat. 2 Wm. 4, c. 39, s. 10, requires a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitations, the defendant should still plead generally that the cause of action did not accrue within — years before the commencement of the suit; and if the plaintiff replies that the cause of action did accrue within the limited time, he must shew, by a proper record, that all the formalities required by the 10th section have been complied with.

Verification, &c. Wherefore, &c., if the plaintiff ought further to maintain his said action.

Second plea, also in bar of the further maintenance of the action, that the first and only writ with which the defendant had been served in the action, and to which he had entered an appearance, was a writ of pluries summons, dated, 1st of October, 1846. That that writ was issued in continuation of another writ issued on, and bearing date the 3rd of August, 1846. [It then stated the issuing of prior pluries writs in a similar manner, up to the 30th of December, 1843, and the issuing of that writ in continuation of an alias writ of summons, bearing date the 7th of August, 1843, which writ was in continuation of the original writ of summons mentioned in the declaration. It then continued thus:] And the defendant further saith, that the writ of pluries summons above mentioned to have been issued on, and bearing date the 28th of March, 1846, was not entered of record within one calendar month next after the expiration thereof, including the day of such expiration, according to the form of the statute in such case made and provided; and that no proceedings towards outlawry have been had upon any of the said writs; and that the cause of action in the declaration mentioned did not accrue at any time within twenty years next before the date and issuing of the writ of pluries summons above mentioned to have been issued, and bearing date the 3rd of August, 1846, or before the date and issuing of the said writ of summons above mentioned to have been issued on, and bearing date the 21st of October, 1846, and with which the defendant was served as aforesaid, and that the said last mentioned writs were issued more than ten years next after the end of the session of Parliament, holden in the third and fourth years of the reign of his late Majesty King William the Fourth. Verification, &c. Wherefore, &c., if the plaintiff ought further to maintain his said action.

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Special demurrer to the first plea, stating for causes, that the plea is bad as being argumentative, and as stating evidence; inasmuch as it is nowhere directly and affirmatively alleged that the issuing of the said pluries writ of summons, dated the 1st of October, 1846, and with which the defendant was served, was the commencement of this suit, or that the cause of action did not accrue within twenty years next before the commencement of the suit; but certain alleged facts are relied on by way of argument and inference, to shew that such writ of pluries summons ought to be considered as in legal effect the commencement of this suit: and that if it be intended as a plea that the cause of action did not accrue within twenty years next before the commencement of the suit, it is repugnant and inconsistent; inasmuch as it is pleaded in bar of the further maintenance of the action, and then by implication admits, that, at the commencement of the suit, there was a good and sufficient cause of action.

Special demurrer to the second plea on similar grounds.
Joinder in demurrer.

Cooling, in support of the demurrer.

Crompton, contra.

The following authorities were referred to in the course of the argument: *Harris q. t. v. Woolford* (a); *Beardmore v. Rattenbury* (b); *Taylor v. Gregory* (c); *Dickenson v. Teague* (d); *Nicholson v. Rowe* (e); *Gregory v. Des Anges* (f); *Norman v. Winter* (g); *Whipple v. Manley* (h); *Pratt v.*

(a) 6 T. R. 617.

(f) 3 Bing. N. C. 85; S. C.

(b) 5 B. & A. 452; S. C. 1 D.

3 Scott, 534; 5 Dowl. 193.

& R. 27.

(g) 5 Bing. N. C. 279; S. C.

(c) 2 B. & Ad. 257.

7 Scott, 251; 7 Dowl. 304.

(d) 1 C., M. & R. 241.

(h) 1 M. & W. 432; S. C.

(e) 2 C. & M. 469; S. C. 2

5 Dowl. 100.

Dowl. 296.

Hawkins (a); 21 Jac. 1, c. 16, s. 3; 2 Wm. 4, c. 39, s. 10; 3 & 4 Wm. 4, c. 42, s. 3; 2 *Wms. Saund.* 63, g, n. (o), 6th ed.

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Cur. adv. vult.

POLLOCK, C. B., delivered the judgment of the Court (b).

(After stating the pleadings, his Lordship proceeded thus:)—The question in this case arises as to the proper mode of pleading the Statute of Limitations, (whether to an action of covenant, or trespass, or assumpsit), since the stat. 2 Wm. 4, c. 39, s. 10, requiring a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitation.

In the old mode of proceeding, if the plaintiff sued by bill, he might elect to treat the filing of the bill, or the previous process by latitat, as the commencement of the suit; and if the defendant pleaded that the cause of action accrued more than six years before the filing of the bill, the plaintiff must have replied the latitat returned, with continuances to connect it with the bill; *Beardmore v. Rattenbury* (c). If the defendant had pleaded that the cause of action did not accrue within six years before the commencement of the suit, such a replication was neither necessary nor proper; and in proceedings in the Common Pleas, or by original writ, the plea always was in the latter form; and the replication alleged, that the cause of action accrued within six years before the commencement of the suit; and the plaintiff must then, as a matter of evidence, have shewn the issuing and return of the writs, and proper continuances, by a copy of the record.

As the Uniformity of Process Act puts all actions on the same footing, and makes the issuing of the writ of summons the commencement of the suit, the plea of the Statute of Limitations ought to be in the same form; and if the plaintiff replies that the cause of action did accrue

(a) 15 M. & W. 399.

(c) 5 B. & A. 452.

(b) In Hilary Term last.

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within the limited time, he must shew, by a proper record, all the formalities required by the 10th section to have been complied with; just as he must have done before, where there was a plea that the cause of action did not accrue within six years, &c., before the commencement of the suit.

An anomaly is introduced by this enactment, namely, that if the plaintiff has to shew the commencement of the suit in answer to a plea of tender, or for any other purpose than to defeat the bar of the Statute of Limitations, he need not prove all these requisites; *Gregory v. DesAuges* (a). In *Pratt v. Hawkins* (b) we have already held, that if this ordinary form of plea is adopted, the plaintiff must give this proof. The case, as reported, contains some inaccuracies: it was tried before Lord Chief Justice *Tindal*, not Lord *Denman*; and the roll amended was the record of continuances which the plaintiff had improperly made up: the substance, however, of the report is perfectly right.

But the defendant not only may, but, we think, ought to plead in this form.

The stat. 3 & 4 Wm. 4, c. 42, s. 3, follows the language of the Statute of Limitations 21 Jac. 1, c. 16, s. 3, and enacts, that the action of covenant shall be "commenced and sued" within the limited time; and the proper form, which was always adopted in every action commencing otherwise than by bill was, that the cause of action accrued, or that the promise was made, &c., more than the limited time before the commencement of the suit; and what was the commencement of the suit was a matter of evidence then, and is equally so now.

The objection to both these pleas, which is pointed out on special demurrer, is, that they do not contain a direct and positive allegation that the cause of action accrued twenty years before the commencement of the suit; but only an indirect and argumentative allegation that it did,

(a) 3 Bing. N. C. 85.

(b) 15 M. & W. 399.

because it accrued more than twenty years before the pluries summons with which the defendant was served, and that that writ could not, according to the stat. 2 Wm. 4, c. 39, s. 10, be connected with any anterior process, and must, therefore, be considered as the commencement of the suit.

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Before the late statute for the Uniformity of Process, a similar plea, stating that the cause of action accrued before the service of a particular writ, and that such writ was not connected with any prior one, would, we think, be open to the same objection; it would, in truth, be a pleading of evidence: and we think the statute has made no difference in this respect.

Further, we think that the plea is not properly pleaded in bar of the further maintenance of the action. The effect of non compliance with the exigencies of the statute is, that the suit is commenced too late, and ought altogether to be barred; and the defendant is entitled to all his costs from the commencement of the suit. It cannot be considered as properly brought up to the time of the first default, committed in not continuing properly the process; and such default puts the suit in the condition of not having been "commenced and sued" within the time prescribed.

And this objection, we think, is sufficiently pointed out by the special demurrer.

Our judgment is for the plaintiff.

Judgment for the Plaintiff.

COURT OF COMMON PLEAS.

Easter Term.

IN THE ELEVENTH YEAR OF THE REIGN OF VICTORIA.

J.C. & C.B. 749

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NEWTON v. LORD CONYNNGHAM.

The Court refused to permit execution to issue notwithstanding a writ of error, the notice of allowance stating the ground of error to be that the defendant had set forth the award of a ca. sa. for costs of a non-suit, since the 7 & 8 Vict. c. 96, s. 57, which prohibits a person from being taken in execution where the sum recovered does not exceed 20*l*.

BRAMWELL moved under Reg. Gen., Hilary Term, 4 Wm. 4, (Practice Rules) r. 9, for a rule to shew cause why, upon reading the judgment roll with the award of execution thereon, the copy of the assignment of errors delivered to the defendant's attorney, and a copy of the notice of the allowance of the writ of error, the defendant should not be at liberty to proceed in the execution of the writ of ca. sa., notwithstanding the allowance of the writ of error, the grounds of error being frivolous; with a stay of proceedings in the mean time. The present action had been brought against the defendant as one of the members of a provisional committee of a railway company, and the plaintiff was nonsuited. The defendant taxed his costs, and the Master allowed 104*l*. 11*s*. 9*d*. He then made up the judgment roll in the usual manner, with an award of a writ of test. ca. sa. to satisfy the defendant, the sum of 104*l*. 11*s*. 9*d*. On this, the plaintiff sued out a writ of error, and the cause assigned

was, that since the 7 & 8 Vict. c. 96, it is contrary to law to take or charge in execution the body of any person upon any judgment obtained in any of her Majesty's superior Courts in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.* exclusive of the costs recovered by such judgment. The writ having been allowed, a notice of the allowance was served by the plaintiff on the defendant, and a summons was taken out to set it aside, on the ground that the error so assigned was frivolous. The summons was heard before Mr. Justice *Coltman*, who declined making any order, but recommended the defendant to apply to the Court. The objection, it seemed, to the writ was, that as no sum had been recovered, there was not a recovery of a sum exceeding 20*l.*, and, consequently, the case came within the provisions of the 7 & 8 Vict. c. 96, s. 57. The language of the section in question was "that no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior Courts, or in any County Court, Court of Requests, or other inferior Court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.* exclusive of the costs recovered by such judgment." The words of the section were clearly applicable to those cases wherein there had been a recovery against a defendant for a less amount than the limited sum. The two following sections were in conformity with this view. By section 58 it was provided, that persons in execution for sums not exceeding 20*l.* at the time the act passed should be discharged, and by section 59, if the Judge trying the cause in such cases was of opinion "that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability without having at the same time a reasonable assurance of being able to pay or discharge the same," "it shall be lawful for such Judge, if he shall think fit, to order that such defendant

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may be taken and detained in execution upon such judgment in like manner and for such time as he might have been if this act had not been passed." It was evident from the language of these sections, that the Legislature had the case of defendants in contemplation, and not those of plaintiffs. It was a misuse of terms to say that the plaintiff had not recovered a sum exceeding 20*l.* exclusive of costs, since having been nonsuited, he never was in a situation to recover anything. The section must mean to apply to those cases where something had been recovered, though it was a sum which did not exceed 20*l.* [*Cresswell, J.*—I rather think, that in point of practice some of the Judges have thought the statute does apply to plaintiffs, and have accordingly, on application by them, made an order for their discharge.] If that was the true construction of the act, it would be productive of great hardship on defendants, who would then be prevented from obtaining by the ordinary process, the costs incurred in resisting improper claims. If, however, the Court felt any doubt upon the question, the defendant would not incur the risk of further costs, and, therefore, would decline taking the rule.

WILDE, C. J.—As some of the Judges appear to have construed this section as applicable to the case of plaintiffs as well as that of defendants, and in consequence have discharged plaintiffs when taken in execution for costs, I cannot say that the question raised by this writ of error is not a proper one for the opinion of another Court. From what is stated to us, it does not appear that there are any special circumstances in the present case which should authorize the Court to interfere in the manner proposed. I think, therefore, that the Court ought not to grant the rule.

COLTMAN, J.—I am of the same opinion. It struck me at Chambers that the ground of error stated could not be considered frivolous, and I have not heard anything in support

of the present application which induces me to alter my opinion.

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CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused (a).

(a) The ground of error above stated has since been held in the above case by the Court of Exchequer Chamber to be untenable, and, consequently, it may be con-

sidered as settled that the 7 & 8 Vict. c. 96, s. 57, does not apply to plaintiffs. The decision has not yet been reported.

See 6, 8 & 9 L. 734

HOARE v. LEE.

L. C. & C. B. 754

W. H. COOKE moved for a rule to shew cause why the order of *Cresswell, J.*, in this case, should not be rescinded. The present was an action of trespass, and two of the counts contained in it were, one in the ordinary form for breaking and entering the plaintiff's rooms, and another founded on the statute of 2 Wm. & M. sess. 1, c. 5, s. 5, to recover double value of goods improperly distrained for rent. The latter was in the following form:—

That the defendant heretofore, to wit, on the day and year first aforesaid, by and under colour of the statute in such case made and provided, with force and arms, &c., then seized, took, and distrained divers other goods and chattels of the plaintiff, to wit, goods and chattels of like quantity, quality, description and value, to the said goods and chattels in the said first count mentioned, as for and in the name of a distress for certain rent then claimed, and pretended by the defendant to be due and in arrear from the plaintiff for and in respect of certain rooms and premises theretofore demised by one J. B. to the plaintiff; and then carried away and detained the same as and for such

The Court refused to allow a plaintiff to retain in his declaration a count in trespass in the ordinary form, for breaking and entering the plaintiff's premises, together with a count under the 2 Wm. & M. sess. 1, c. 5, s. 5, to recover double the value of goods improperly distrained.

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distress for a long space of time, to wit, for the space of two calendar months then next following; and afterwards, to wit, on the first day of May, in the year aforesaid, by and under the like colour and pretence, sold and disposed of the said last mentioned goods and chattels, and converted and disposed thereof, and of the moneys therefrom arising to his, the defendant's, own use: whereas in truth and in fact, no rent was due or in arrear from the plaintiff for the said last mentioned premises during the time in this count aforesaid; contrary to the form of the statute in such case made and provided; and other wrongs to the plaintiff the defendant then did, against the peace of our Lady the Queen, &c.

A summons to strike out one of these counts was taken out by the defendant, and was subsequently heard before *Cresswell*, J., at Chambers, where he made an order in these terms: "I do order that the plaintiff within three days elect which count in the declaration he will strike out, otherwise the second count be struck out, and in either event at the cost of the plaintiff, to be taxed." It was admitted that the cause of action relied on by the plaintiff was the same in both counts. The question, however, was, whether the two counts here were in apparent violation of the rule of Hilary Term, 4 Wm. 4, r. 5. It was submitted that they were not. The words of the rule in question were "several counts in trespass, for acts committed at the same time and place, are not to be allowed." The causes of complaint, as they appeared on the face of the declaration, were clearly different. In order to enable the plaintiff to recover under the second count, it would be necessary to prove much more than would be requisite under the first count, as he must prove the taking of the goods under the pretence of rent being due. This view was in conformity with the cases which had been decided on this rule of Court. In *Thornton v. Whitehead* (a), the declaration

(a) 4 Dowl. 747; S. C. 1 M. & W. 14.

contained two counts, one for double rent under the 11 Geo. 2, c. 19, and the other for use and occupation, and the Court there held that the plaintiff was entitled to retain both counts. No doubt the case of *Lawrence v. Stephens* (a) was in some degree inconsistent with this view, but the Court in *Thornton v. Whitehead* expressed its dissatisfaction with that case so far as it could be considered as an authority against the view taken by the Court in the case before it. [*Wilde, C. J.*—The second count only states the same trespass as is stated in the first, with circumstances of aggravation. Although by the operation of the statute of 2 Wm. & M. sess. 1, c. 5, the plaintiff could recover in respect of matters not embraced in the first count, that by no means prevents his recovering in respect of all matters that are embraced in the first. Here the act of which the plaintiff complains in both counts was committed at one and the same time. The words of the rule are “several counts in trespass, for acts committed at the same time and place, are not to be allowed.” This case would therefore appear to come within the very words of the rule.] The subject of complaint in the second count, namely, the sale, was subsequent to the seizure, and it was in respect of that sale that the statutable right existed. The cases of *Gilbert v. Hales* (b); *Cahoon v. Burford* (c); and *Vaughan v. Glenn* (d), were in support of the present application. [*Cresswell, J.*—Those cases were cited to me at Chambers, but I thought they were distinguishable from the present.] If the plaintiff relies on a statutable claim, he cannot recover on the count framed on that claim, unless he proves all the facts necessary to comply with the requisites of the statute. In the case of *Masters v. Farris* (e) it was held, that on such a count as the second, the jury ought to be directed to give double the value of the goods.

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(a) 3 Dowl. 777.

13 M. & W. 136.

(b) *Ante*, vol. 2, p. 227.

(d) 5 M. & W. 577.

(c) *Ante*, vol. 2, p. 234; S. C.

(e) 1 C. B. 715.

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WILDE, C. J.—If the counts are apparently for the same cause of action, it seems to be conceded that the learned Judge's order ought not to be rescinded. The second count in the present case appears to me to differ from the first only in stating circumstances of aggravation. It is, therefore, only the same cause of action "varied in statement, description, or circumstances only," and, therefore, expressly forbidden by the rule to be allowed. If at the trial the plaintiff should be unable to prove the circumstances alleged in the second count, he may still be able to recover in respect of the simple trespass on that count. I think no rule should be granted.

COLTMAN, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule refused (a).

(a) In *Slack v. Clifton*, 8 Q. B. 524, it was held by that Court, that where a Judge at Chambers has dismissed a summons to strike out a count, the full Court will not interfere. In *Grissell and Another v. James*, 4 C. B. 768, however, the contrary was held by the Court of Common Pleas.

8 C. & Ab. 770.

TOBY v. LOVIBOND.

Where a cause and all matters in difference were referred at nisi prius, the arbitrator to have power to direct a verdict for either party,

and neither party to bring a writ of error, but no power to direct judgment non obstante verdicto was given: *Held*, that the arbitrator had no power to direct such a judgment, and the Court refused to order such a judgment to be entered.

The award directed a verdict to be entered for the plaintiff on certain issues, with 1*l.* damages, and continued, "which sum, except for my finding on the other issues, the plaintiff would be entitled to recover in the said cause:" *Held*, that the award was final as to the damages.

It is sufficient to award mutual releases in general terms, without specifying the form in which they are to be executed.

the arbitrator had adjudicated on it or not; third, that the award left it doubtful whether any damages had been assessed for the plaintiff, and, if any awarded, how they were to be recovered; fourth, that the award directed mutual general releases without specifying their form. This rule also required in the alternative that the Court should direct judgment to be entered non obstante veredicto on the finding on the third and sixth pleas.

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It appeared from the affidavits, that the declaration in the present case was in the usual form, on an indenture of apprenticeship. Two breaches were assigned: the first breach was for neglecting to instruct the apprentice; the second breach for not supplying him with food and necessaries. The defendant pleaded six pleas. First, to the first breach, performance of the covenants in the indenture up to the 4th of July, 1846; second, to the first breach, that from the 4th of July, 1846, the defendant was prevented from instructing the apprentice by his absenting himself; third, to the first breach, a justification from and after the 4th of July, 1846, because the apprentice committed acts of felonious embezzlement. The three last pleas were pleaded to the second breach, and were similar to the first, second, and third pleas respectively. The plaintiff replied to the first and fourth pleas, by taking issue. To the second and fifth pleas, that the apprentice offered to return, but the defendant refused to receive him. To the third and last pleas, *de injuriâ*. Issue thereon. The defendant rejoined to the replication to the second and fifth pleas, denying that the apprentice offered to return. Issue thereon. The cause came on for trial at the sittings for the county of Middlesex, after Easter Term, 1847, when it was referred by order of *nisi prius*. The material parts of the order were the following:—It is ordered by the Court, with the consent of all parties, their counsel and attorneys, that a verdict be entered for the plaintiff, damages 500*l.*, costs 40*s.*, but that such verdict should be subject to the award, order, arbitrament, final end and determination of G. P. Esq.,

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barrister-at-law, who is hereby empowered to direct that a verdict shall be entered for the plaintiff or the defendant, as he shall think proper, and to whom this cause and all matters in difference between the said parties are hereby referred, &c. It is likewise ordered that the costs of the said suit, to be taxed, shall abide the event of the said award, and that the costs of the reference and award, to be taxed, shall be in the discretion of the said arbitrator, &c. And by the like consent it is further ordered, that the said parties shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end and determination of the said arbitrator; and that neither of the said parties shall bring or prosecute, or cause to be brought or prosecuted, any writ of error or any action or suit at law or in equity, against the said arbitrator, or against each other, of or concerning the matters referred by this order. And by the like consent it is also ordered, that the indenture of apprenticeship, in the pleadings in this cause mentioned, shall be cancelled, and that the said arbitrator shall, by his award, order and direct what shall be done by the parties respectively, except that he is not to have power to order the defendant to take E. J. Toby into his service again. The parties appeared before the arbitrator, evidence was adduced on both sides, and the arbitrator made his award. After reciting the order of reference, the award proceeded in these terms:—Now I, the said G. P. (the arbitrator) having taken upon myself the burden of the said reference, having examined upon oath all such witnesses as were produced before me by the said parties respectively, and having duly weighed and considered all the allegations, proofs, and vouchers made and produced before me, do hereby award, order and adjudge as to the said cause, that the verdict now entered be set aside, and that the two several issues in the said cause arising respectively upon the rejoinders of the defendant to the replications of the plaintiff to the second and fifth pleas of the defendant, be

entered for the plaintiff; and that all the other issues in the said cause be entered for the defendant. And I do hereby assess the damages of the plaintiff upon the said several issues, which I have ordered to be entered for him, at the sum of 1*s.*, which said sum, except for my finding upon the said issues, the plaintiff would be entitled to recover in the said cause. And as to the said matters in difference, I do award, order, and determine, that neither of the said parties hath any claim, right, title, or cause of action whatsoever against the other of them, in respect of any matters in difference referred to me. And I do order and direct that the said parties respectively shall and do each upon the requisition of the other of them, and at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each unto the other of them, mutual general releases in writing of all and all manner of actions and causes of action, controversies, claims and demands of what kind soever, from the beginning of the world, until the time of the making of the said order of reference. And as to the costs of this reference and award, I do award and determine that each of the said parties shall bear and pay his own costs incurred by him in and about the said reference. And that the costs of this award be borne and paid by the said parties in equal moieties, &c.

It also appeared upon affidavit, that at one of the meetings before the arbitrator, the plaintiff's counsel submitted, as a matter for the arbitrator's decision, that the third and sixth pleas were bad in law, which was admitted by the counsel for the defendant, and that the plaintiff's counsel then formally and for the purpose of taking the opinion of the Court of Common Pleas on the point, and as he so informed the arbitrator, requested him to award and give judgment for him non obstante veredicto, on the issues raised on the third and sixth pleas, in case he should find the said pleas in point of fact proved by the defendants. That the counsel for the defendant contended, and the arbitrator said he

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thought he had no power to give judgment non obstante veredicto; but if he thought either of the pleas bad in law, he would endeavour to make his award in such a way that his decision might be reviewed by the Court.

Unthank. Assuming that the pleas were bad, the plaintiff was not in a condition to make the objection, as there was the usual clause in the order of reference that neither party should bring a writ of error. In the case of *Chownes v. Brown (a)*, the Court of Exchequer decided that the clause in question prevented a party from moving in arrest of judgment. That was a clear authority against the fresh application, as the effect of it was to shew that the parties, by consenting to such a clause, had precluded themselves from objecting to any defect in the pleadings. *Britt v. Pashley (b)* was precisely in point. There the Court of Exchequer held that the usual clause in an order of reference "that neither party do bring or prosecute any action or suit, in any Court of law or equity, against the said arbitrator, or against each other, for any matter concerning the premises so as aforesaid referred," precluded the plaintiff from moving for judgment non obstante veredicto. In *Steeple v. Bonsall (c)*, there being several issues in a cause referred to an arbitrator, he directed a verdict on two issues, and for the defendant on the third, adding, that if there had not been the third issue, he should have awarded 1*s.* damages to the plaintiff on the other issues, and the Court held that it was not competent for the plaintiff to move for judgment non obstante veredicto. There Lord *Denman* said, "We think that it was not open to the plaintiff to come to the Court in this case. The arbitrator's power was complete and final. He had power to do what the Court could do; and his award therefore, puts an end to the proceedings." But supposing

(a) *Ante*, vol. 2, p. 706.

(b) *Ante*, p. 97; S. C. 1 Exch. 64.

(c) 4 A. & E. 950, 953.

that the parties were in a situation to make the application, the arbitrator had no power to direct judgment non obstante veredicto to be entered. The case of *Angus v. Redford* (a), was a direct authority to that effect. It was there held that an arbitrator to whom a cause is referred, with power to direct how a verdict shall be entered, has no authority to arrest the judgment. There *Parke*, B., said, in speaking of the arbitrator, "He is put into the situation of the jury, and no more; nothing is said in the order of reference about the judgment; and the only object of referring the cause to him is, that he may direct how the verdict shall be entered." With regard to the assessment of damages, that was merely contingent, and was quite regular; *Clement v. Lewis* (b); *Morrish v. Murray* (c). Then as to the general award of releases. That was the invariable mode of awarding them, without prescribing the peculiar form in which they were to be made.

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Prentice, in support of the rule. The reference here was of all matters in difference, as well as of the cause. The validity of the pleas was therefore a matter which the arbitrator might determine under the power conferred on him. As to the contingent assessment of the damages, no power thus to assess them had been given to the arbitrator, and, therefore, the assessment was an excess of authority. With regard to the award of general releases, the form of them, and the mode of executing them, had not been stated, and, therefore, it was uncertain as to how the directions of the arbitrator were to be complied with. In the case of *Glover v. Barrie* (d) it was held, that an award was bad which directed the defendant to beg the plaintiff's pardon in such manner and in such place as the plaintiff should appoint. On these grounds it was submitted that the award

(a) 11 M. & W. 69, 75; S. C. 2 Dowl. 735, N. S.

(b) 3 B. & B. 297; S. C. 7 Moore, 200; 10 Price, 181.

(c) *Ante*, vol. 2, p. 199; S. C. 13 M. & W. 52.

(d) Salk. 71.

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ought to be set aside, or that the Court should direct judgment non obstante veredicto to be entered.

WILDE, C. J.—It seems to me that none of the grounds of objection to the award are substantial, and that that part of the rule which asks for judgment non obstante veredicto to be entered for the plaintiff, is what the Court has no power to grant. It is settled law, that where matters of law and fact are referred to an arbitrator, it is not competent to the Court to be a tribunal in the matter against the decision of the arbitrator, and without the consent of the parties, who, having made their election, cannot afterwards escape from its consequences. It is also clear, that if there be matters of law which the arbitrator thinks are proper to be raised as questions of law for the Court to determine, the Court will entertain them; and to this the parties to the reference are presumed to agree. The Court is not, in this case, asked to give their judgment on any matter of law which has been so referred to them, but it is said that the parties ought not to be concluded by an erroneous opinion which the arbitrator has formed; and that the arbitrator has erred in this: that he has decided that he had no authority to direct judgment to be entered for the plaintiff non obstante veredicto, whereas, on looking at the authority given to him by the order of reference, the Court will see that he had. It is necessary for us to see then what was the state of the record at the time the matters were referred. It contained only issues in fact. There might have been issues in law, and on which the arbitrator might have had to decide; but the parties to the cause not having demurred, but pleaded over, the only questions raised on the record were questions of fact. Was the question about entering judgment non obstante veredicto a matter in difference at the time of making the order of reference? I am of opinion that it certainly was not, and that no such question could have arisen until the award had been made, and the issues in fact disposed of. That which was pre-

sented before the arbitrator, and what he was required to do was, what the case of *Angus v. Redford* (a) shews he had no power to do; for it seems to me that the case of *Angus v. Redford* is a distinct authority on the point, that the arbitrator could not direct the entry of a judgment non obstante veredicto. The cases concur in this, that neither the Court nor the arbitrator has the power to enter judgment non obstante veredicto after an order of reference in terms similar to the present; and the result, therefore, is, that parties must, in the order of reference, be more distinct as to what they mean to refer, if they intend the arbitrator to decide upon such a question. Here the parties have not only empowered the arbitrator to direct mutual releases to be given, but they have also agreed not to bring any writ of error. That is a strong argument to shew that the parties never intended that the arbitrator or the Court should have this power of controlling the judgment entered up on the award, as such judgment could not afterwards be reviewed by a Court of error. Besides, what is there on the face of the award which gives rise to the present objection? Suppose the arbitrator had thought the pleas were good, the frame of the award would have been the same as it now is; and if the arbitrator thought that judgment non obstante veredicto ought not to be given, must he state so in his award, or is it not enough that he does not direct such judgment to be given? Therefore, although the arbitrator might, during the course of the argument before him, have expressed an opinion against the validity of the pleas, he might afterwards, consistent with this award, have thought that the pleas were good; and there is, consequently, nothing to shew that he did not exercise thereon his judgment. The other objections which have been made need not be adverted to. The terms of the releases were stated with sufficient precision; and as to the assessment of the 1*s.* damages, it is clear that the arbitrator never contemplated that the same should be recovered by the

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(a) 11 M. & W. 69.

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plaintiff. Indeed, this objection was not much pressed by the counsel for the plaintiff. For these reasons, I am of opinion that the present rule should be discharged.

COLTMAN, J.—The arbitrator has done all that he ought to have done. The matters in difference submitted to him were the issues in fact. It does not appear on the award whether, in his opinion, the pleas are good or bad. It might operate to the prejudice of the other side, if the badness of the pleas before the arbitrator could have been insisted on. The party might have been willing to refer the issues in fact, but not the issues in law, and the clause restraining the bringing a writ of error might have influenced him in submitting to a reference. He might have said *non hæc in fœdera veni*, if the goodness of the pleas were to be disposed of before the arbitrator. The case of *Angus v. Redford* (a) supports our view.

CRESSWELL, J.—If the arbitrator makes a mistake, and supposes that his authority is more limited than it is, and acts in conformity with that mistaken view, his award will be defective. He must fully exhaust all the authority conferred on him. There were no issues in law here. All controversy as to whether the pleas were good was waived, and the arbitrator had only to determine the issues of facts. It is a mistake to suppose that there was any controversy of law at the time of the reference. Suppose the parties had gone to trial in the ordinary way, judgment would have followed the finding of the issues. Some further step would have been necessary to raise a controversy, as for instance, an application to enter judgment *non obstante veredicto*. So that the arbitrator must virtually make a second award, for the purpose of entering judgment *non obstante veredicto*, on his finding of the issues by his first award. There is no difficulty as to the form of the mutual releases. And the clause as to 1*s.* damages only means

(a) 11 M. & W. 69.

this. "I do not affect to award that sum as damages, because there are other pleas in bar found against the plaintiff; but if the Court should think fit to arrest the judgment on those pleas, I assess the damages at that sum."

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WILLIAMS, J.—I quite agree. The arbitrator here could not order an entry of judgment non obstante veredicto, there being no such power conferred on him by the submission. If parties wish such powers to attach, they should introduce them into the order of reference. Such a course would be fair and proper, but when a defendant has consented to abide by the decision of an arbitrator on matters of fact, the plaintiff cannot insist on the defendant being bound on matters of law. If at the time the consent to refer was given, the plaintiff had attempted to introduce into the order a provision authorizing the arbitrator to decide upon legal objections existing on the record, the defendant would perhaps have said, "on those terms I will not consent to any reference at all."

Rule discharged, with costs.

FIELD v. SAWYER.

HUGH HILL shewed cause against a rule obtained by *Snow*, which called upon the plaintiff to shew cause why the defendant should not be at liberty to add a plea that the plaintiff was not a sworn broker, duly licensed in pursuance of the 6 Ann. c. 16, s. 4. It was an action of assumpsit, and was brought to recover certain sums paid by the plaintiff as the broker of the defendant, on certain share transactions. The declaration contained counts for

Where a plaintiff had countermanded notice of trial, and it did not appear that he would be delayed in proceeding to trial in consequence of the defendant adding a plea, the Court permitted him to add one, to the effect that the plaintiff was not a broker duly licensed in pursuance of the 6 Ann. c. 16, s. 4.

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money lent, money paid, work and labour, and on an account stated. On the 29th of January, 1848, the defendant pleaded several pleas, namely, first, non assumpsit; secondly, set-off; thirdly, that the moneys sought to be recovered were moneys due for differences on time bargains in the funds, in breach of 7 Geo. 2, c. 8. On the 4th of February, the plaintiff delivered a replication to the first and second pleas, and a special demurrer to the third. On the 9th of February, the defendant joined in demurrer. On the 7th of April, the plaintiff delivered the issue, indorsed with notice of trial for the second sittings in London in Easter Term, which would take place on the 5th of May. A few days afterwards, the defendant took out a summons to amend his third plea, and add a fourth plea, that the plaintiff was not a sworn broker, duly licensed in pursuance of the 6 Ann. c. 16, s. 4. *Maule, J.*, before whom the summons was heard, made an order on the 20th of April, permitting the amendment on payment of costs, but his Lordship refused to allow the additional plea. The plaintiff then countermanded his notice of trial, and now the present application was made to review the order of Mr. Justice *Maule* as to refusing to allow the proposed plea. It was submitted that the defendant was not in a situation to obtain the favour he asked after the delay which he had permitted to take place since the time for pleading. The affidavit in support of the application, although it stated that in answer to inquiries at the Chamberlain's Office in the city of London, it was ascertained that the plaintiff was not a sworn broker, no statement appeared as to when those inquiries were made. As against the defendant, therefore, it must be presumed that he was aware, on the 29th of January, when he pleaded that the facts stated in the proposed plea were in existence. It was his duty, therefore, to have pleaded at that time the plea now proposed to be added, and not delayed until this late period of the cause, when the issue had been made up, and notice of trial given.

Snow, in support of the rule, contended that the delay which had occurred was not of such a description as to disentitle the defendant to put the proposed plea on the record which he would have had a right to do, had he pleaded it on the 29th of January. It was a perfectly valid plea, as was decided in *Cope v. Rowlands* (a); and the Court had interfered to permit pleas to be added although a delay existed on the part of the defendant, where no injury would accrue to the plaintiff. Thus in *Huber v. Steiner* (b), where to a plea of the Statute of Limitations the plaintiff replied that he resided abroad until within six years of the commencement of the action, the Court on terms allowed the defendant to add a plea setting up a provision of the law of the country where the note was made, and the parties resided, similar in its effect to the Statute of Limitations. Now, in the present case, it did not appear that the defendant was in a situation to plead the plea proposed for want of information at the time of pleading his three previous pleas. The only question then was, whether any injury could accrue to the plaintiff in consequence of the delay. It was quite clear that none could, as he had countermanded his notice of trial.

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WILDE, C. J.—The plea which the defendant now proposes to add is one which he would have a right to plead, had he applied in the usual way at the ordinary time for pleading. He has permitted that period to pass, and we are now to determine whether, under the circumstances, he is entitled to add the plea as proposed. It appears to me that there is no objection to his being allowed so to do. No doubt the plaintiff ought not to be damnified in his action by the delay of the defendant. But whether that delay will be injurious to him must depend upon the peculiar circumstances of the case. Now here it cannot

✓(a) 2 M. & W. 149.

✓(b) 2 Dowl. 781; S. C. 4 M. & Scott, 328.

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be said that the plaintiff is delayed in proceeding to trial in consequence of this application, or of the defendant being permitted to add the proposed plea. The defendant may, on payment of the costs of this application, have the rule absolute.

The rest of the Court concurred.

Rule absolute accordingly.

HAMS v. PAWLETT.

The Court refused to change the venue after issue joined and notice of trial given, where it was not shewn in the affidavit in support of the application that the change would not be inconvenient to the plaintiff, or in what respect it would be productive of convenience to the defendant.

SANDERS shewed cause against a rule for changing the venue from the county of Middlesex to the county of Cambridge. It was an action brought by the outgoing tenant of a farm in Cambridgeshire against the incoming tenant. The plaintiff declared in debt, and the defendant pleaded never indebted. The affidavits disclosed that on the 10th of March, 1848, the plaintiff delivered a declaration, and the defendant twice obtained time to plead on the usual terms. He then pleaded never indebted. On the 29th of March, the plaintiff made up the issue, and, on the 12th of April, delivered it, indorsed with notice of trial for the 26th of the same month. The present rule was then obtained by the defendant on an affidavit which did not state any cause for the delay in making the application, or that he intended to call any witness, or in what respect the change would be beneficial to him, or that he had any merits.

Burcham, in support of the rule, contended, that as it appeared that the action was brought by the outgoing tenant of a farm in Cambridgeshire against the incoming tenant, it must be clear that the cause could be tried more conveniently to the defendant in Cambridgeshire than in Middlesex.

WILDE, C. J.—When the plaintiff declared, the defendant

must have known both the nature of the claim set up, and of his own defence. The issue was delivered on the 12th of April; he knew then precisely what issue was to be tried, and what evidence would be required. It was his duty then, if he desired to change the venue, to come promptly to the Court for that purpose; but instead of so doing, he delayed a week, and then made this special application. He does not now shew in what respect it will be beneficial to him, that the change of venue should take place. He may have many witnesses to call, or he may have none. There is an absence also of any statement that the change would be productive of no injury to the plaintiff. It may be that all his witnesses are resident in London, and, therefore, that it would be very inconvenient to him that the venue should be changed to Cambridgeshire. The effect of making this rule absolute would be to delay the plaintiff's judgment until after the next assizes, and, therefore, unless good reason is shewn us for interfering in the manner proposed, we ought not to make the present rule absolute.

The rest of the Court concurred.

Rule discharged, with costs.

TUBBY v. STANHOPE.

LUSH moved for judgment on an issue on a plea of nul tiel record. It was an action of debt by the assignee of a replevin bond. The declaration set forth the bond in which the defendant became surety with the tenant Hart, containing the usual condition to prosecute. It then proceeded to aver a plaint by the tenant, Hart, in the Whitechapel County Court of Middlesex, and that such proceedings were had, that it was "adjudged by the said County Court

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should take nothing by his plaint. The defendant pleaded nul tiel record. Issue was joined on this plea, and the plaintiff produced an entry from the County Court book, in which the entry was as to the plaint "struck out for want of jurisdiction, on the ground of a disputed title having been sworn to:" *Held*, that this entry did not support the averment in the declaration.

In a declaration on a replevin bond, it was alleged that A. H. (the plaintiff in replevin) levied his plaint in the County Court against the present plaintiff, and that it was adjudged that A. H.

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that the said A. Hart (the tenant) should take nothing by his said plaint." It then alleged that the bond became thereby forfeited, and set forth the plaintiff's title by assignment from the sheriff. The defendant pleaded nul tiel record. The plaintiff, by his replication, alleged that there was such a record. A certiorari was issued, and the following return was made by the Judge of the County Court.

WHITECHAPEL COUNTY COURT OF MIDDLESEX.

Extract of Minute of Proceedings at a Court holden on Tuesday, the 26th of October, 1847.

No.	Plaintiff.	Defendant.	Particulars of Claim.	Amount claimed.	For whom judgment given.	Amount of judgment.	Costs.	Order.
7479	Abraham Hart.	Samuel Tubby.	Unlawful detention of goods belonging to plaintiff.	£ s. d. 6 0 0				Struck out for want of jurisdiction, a disputed title having been sworn to.

Extract of Minute of Proceedings at a Court holden on Friday, the 26th of November, 1847.

No.	Plaintiff.	Defendant.	Particulars of Claim.	Amount claimed.	For whom judgment given.	Amount of judgment.	Costs.	Order.
7479	Abraham Hart.	Samuel Tubby.	Replevin for unlawful detention of goods belonging to plaintiff.	£ s. d. 6 0 0	Plaintiff.	£ s. d. 4 4 0	£ s. d. 5 8 10	To be paid on the 3rd day of December next.

Sealed with the Seal of the Court.

(Signed)

J. M., Judge.

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The question was, whether this return did not shew that such a judgment as that alleged in the declaration had been pronounced. It was submitted that this was in effect a judgment of nonsuit; for the affidavits produced on the part of the plaintiff shewed that the usual practice in the County Court was to record judgments of nonsuit in that form. [*Cresswell*, J.—We cannot look to those affidavits, but must be bound by the record. *Wilde*, C. J.—The question is, whether this can be considered as a judgment at all?] By section 121, of the 9 & 10 Vict. c. 95, the Judge of the Court had jurisdiction over the matter of the plaint, and he might if he had thought proper, either have nonsuited the plaintiff, or granted a new trial. By the course adopted by the learned Judge of that Court, he had in effect adjudicated on the matter. [*Cresswell*, J.—You must first shew that there was a judgment. But here the Judge does not profess to have given any judgment, but merely says that he strikes it out.]

J. Brown, contra, was stopped by the Court.

WILDE, C. J.—I cannot think that the words “struck out,” mean a judgment. The cause may have been properly or improperly struck out, but the question is, whether striking it out can be considered as a judgment, I think not. Judgment must therefore be for the defendant.

COLTMAN, J., *CRESSWELL*, J., and *WILLIAMS*, J., concurred.

Judgment for the defendant.

Another cause of *Tubby v. Fisher* between the same plaintiff and another surety, in the replevin bond, in which the pleadings, and facts were precisely the same, was decided in the same manner.

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f.c. 6. ch. 91.

In the matter of LLOYD and JONES.

A claim to a right of fishing by the inhabitants of a town is not a question of title to an incorporeal hereditament within the proviso of sect. 58 of the 9 & 10 Vict. c. 95, (The County Courts' Act); and, therefore, the Court refused a prohibition to a County Court forbidding execution to issue on a judgment of that Court in such a case.

TALFOURD, Serjt., shewed cause against a rule obtained by *Morgan Lloyd*, which required the plaintiff to shew cause why a writ of prohibition should not issue to the Judge of the County Court of Merionethshire, to stay execution on a judgment pronounced in the present matter. The ground of the application was, that the question of title to an incorporeal hereditament came into dispute before the Court, and, therefore, by the proviso of the 9 & 10 Vict. c. 95, s. 58, the jurisdiction of the County Court was excluded. By that it was provided, "that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question." It appeared by the affidavits, that a plaint in trespass had been lodged by the plaintiff in the County Court of Merionethshire, in respect of a trespass alleged to have been committed on his estate, near the town of Bala, through which, or adjoining to which, the river Treweryn ran. The defendant was an inhabitant, but not a householder, of the town of Bala, and claimed a right to fish in the river Treweryn, and as incident to that right, the further right to pass over the adjoining lands to fish. A society, it appears, had been formed at Bala, for the assertion and enforcement of the right to fish, alleged to belong, by immemorial custom, to the inhabitants of that place, in the river Treweryn, as well as other rivers. The defendant was sent by that society to assert the right to go over the plaintiff's land, in order to fish in the river. Previous to his so doing, a notice was sent to the plaintiff, that it was the defendant's intention to proceed over the lands of the former in enforcement of the right. It was in respect of the trespass so committed, that the proceeding in the County Court was taken. On behalf of the defendant, it was urged that he was not liable in respect of the trespass proved; first, on the

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ground of a right to fish in the river, and to pass over the plaintiff's land for that purpose; secondly, that a right of way existed over the plaintiff's land to the side of the river; and thirdly, that there was a right of common over the land in question. The Judge required reasonable ground to be shewn to him for believing that any such rights existed; and not being satisfied with the evidence adduced before him, he pronounced judgment against the defendant for 12. The first objection was, that the Judge not having been satisfied that there was any *bonâ fide* ground for any one of the answers set up in answer to the plaint, the question as to the jurisdiction of the County Court did not arise. This observation applied to all the three grounds on which it was sought to sustain the present rule. Next, supposing that the Judge were satisfied that a *bonâ fide* claim existed to any of the three privileges set up by the defendant, the jurisdiction of the Judge was not excluded by the section of the act in question. The words of the statute were, "incorporeal hereditaments," but a right to fish, which was a *profit à prendre*, could not be claimed by custom, as was decided in *Gateward's case* (a). Again, in *Fitch v. Rawling* (b), it was held, that a custom for *all the inhabitants* of a parish to play at all kinds of games, sports, and pastimes, in a certain close, at all seasonable times of the year, at their free will and pleasure, was good; but that a similar custom for *all persons* for the time being *being in the said parish*, was bad. Now, here it appeared by the affidavits, that the defendant, although living within the town of Bala, was not a householder there, and could not consequently be an inhabitant. These observations were equally applicable. Then with respect to the right of way, which the defendant claimed as an inhabitant, that did not constitute a hereditament, and, therefore, did not come within the proviso of the statute. Lastly, the right of common claimed as an inhabitant was

✓(a) 6 Rep. 59, a.

✓(b) 2 H. Bl. 393.

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equally unaffected by the statute. [*Williams, J.*—By the claim which the defendant sets up there is no limitation as to the quantity of fish he claims to be allowed to take. There is no restriction in respect of any house or other matter, nor does he claim the right as the bailiff of the inhabitants. According to this claim as put forward by him he might take all the fish in the river.]

Morgan Lloyd, in support of the rule. The right to take fish was an incorporeal hereditament, in which a man might have an estate of inheritance; 2 *BL Com.* 34; *Com. Dig.* tit. "*Piscary*," (A.) [*Wilde, C. J.*—It is an incorporeal hereditament, not for the inhabitants of the district, but for a private person.] A common of piscary, as well as a right of way were incorporeal hereditaments; and it was held in *Tyson v. Smith* (a), that a custom for all victuallers to erect booths on a common, paying a certain sum to the lord of the manor, was good. So in *Kinnersley v. Orpe* (b), it was held, that a person who fishes in a fishery belonging to another, but to which he has a claim, in order to give occasion to an action to try the right, is not liable to a penalty under the 5 Geo. 3, c. 14. In that case, it appeared, that the party against whom the proceeding was taken had given notice of his intention to trespass, as in the present case, in order to try the right. That case, therefore, was an authority to shew that a bonâ fide claim in respect of such a right as the present, would afford an answer to an action for such a trespass. In *Tinniswood v. Pattison* (c), it was held, that the jurisdiction of the County Court is ousted by a plea or cognizance setting up a title to the freehold, although no issue be taken on that part of the plea or cognizance which alleges the title. [*Coltman, J.*—Is there any case to shew that a profit à prendre without limit can be claimed by the inhabitants of a particular place by way

✓(a) 9 A. & E. 406; S. C. 1 P.
& D. 307.

(b) 2 Doug. 517.
✓(c) 3 C. B. 243.

of custom?] No doubt as a general rule a profit à prendre could not be claimed by way of custom. It was so held in *Grimstead v. Marlowe* (a), and in *Blewett v. Tregonning* (b); but in *Rogers v. Brenton* (c), from the judgment of Lord Denman, it would appear that exceptions might exist to this general rule.

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WILDE, C. J.—In this case, a rule was obtained on the part of the defendant, calling upon the plaintiff to shew cause why a writ of prohibition should not issue, to be directed to the Judge of the County Court of Merionethshire, to stay the further proceedings in this cause.

The ground upon which the defendant claims to be entitled to the writ is, that the action is brought to recover damages for alleged trespass, in having entered the plaintiff's land, and fished, or attempted to fish there; and the defendant contends, that such acts were done in exercise of a right conferred upon him as an inhabitant of the town of Bala, under an immemorial custom; and as the claim of right set up by the defendant under this custom may be disputed, it is contended, that the jurisdiction of the County Court over the cause is excluded by the statute 9 & 10 Vict. c. 95, s. 58, by which it is provided, that the Court shall not have cognizance of any action in which the claim to an incorporeal hereditament may be disputed.

The affidavits in support of the rule state the defendant to be an inhabitant of the town of Bala, and that an immemorial custom exists there, conferring the right before mentioned upon the inhabitants of that town, and that the alleged trespasses were committed by the defendant at the instance or request of certain inhabitants, associated for the purpose of asserting the existence and validity of the custom set up.

The affidavits read in answer to the rule, deny the

(a) 4 T. R. 717.

& M. 234.

(b) 3 A. & E. 554; S. C. 5 N. ✓(c) 10 Q. B. 26.

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existence of the custom in point of fact, and state that the defendant is not a householder, and that he is a person having no visible means of support, and is wholly incompetent to pay any damages or costs which may be recovered against him.

Having heard the arguments in support of the rule, we are of opinion that the jurisdiction of the County Court over the cause is not excluded by the proviso referred to in the statute 9 & 10 Vict. c. 95, and that the rule must be discharged.

The custom set up, is in effect, a custom for the inhabitants of Bala, as such to have a profit à prendre in the soil of another; but we think no question can be said to arise in this case regarding such a custom; for it has been held as clear and undoubted law for two centuries, that no such custom can exist in point of law. The question was determined in 4 Jac. 1, in *Gateward's case* (a), that such a custom is void in law. Ever since that case, the law has been considered as settled, and it is now not open to question or doubt. The jurisdiction cannot be excluded by the pretence of a custom, which it has been so long and solemnly determined can have no valid existence. But further, supposing any question could arise in the cause regarding the alleged custom, still that circumstance would not bring the cause within any of the classes over which the jurisdiction of the County Courts is excluded by section 58, referred to; inasmuch as that section excludes the jurisdiction in causes involving disputed claims to incorporeal hereditaments, and the claim in question is not a claim to an hereditament. "Hereditament" is defined in the Text Books of authority, to signify "all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as chattels do;" *Terms de la Ley*, tit. "*Hereditament*;" *Co. Litt.* 6, a; and *Co. Litt.* 16, a.

✓ (a) 6 Rep. 59, a.

It is obvious that the right claimed under the custom alleged is not a claim to an "hereditament," and, therefore, not such as to exclude the jurisdiction of the County Court.

The rule, therefore, must be discharged, with costs.

Rule discharged, with costs.

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d. c. A. C. B. 761

MANNING, Serjt., shewed cause against a rule which had been obtained by *F. Robinson*, to set aside the replications to the forty-sixth and forty-seventh pleas, except the traverses taken by each of those replications, with costs. It was an action of quare impedit, and the defendants, of whom there were several, severed in pleading. Two of them joined, and pleaded forty-sixthly, in pursuance of the 3 & 4 Wm. 4, c. 27, s. 30, an adverse possession during the incumbencies of three successive clerks, the times of such incumbencies taken together amounting to the full period of sixty years; and forty-seventhly, under the 3 & 4 Wm. 4, c. 27, s. 33, an adverse possession during the period of one hundred years. To these pleas the plaintiff replied as to the forty-sixth plea, traversing the presentation of one of the clerks mentioned in the plea, concluding to the country; and then proceeded to allege the saving of the plaintiff's rights under the statute 7 Ann., setting forth facts to bring the case within that statute, concluding that part of the replication with a verification, and then alleging, that before the induction of each of the three clerks mentioned in the forty-sixth plea, a caveat was duly entered, and, consequently, that such incumbencies were not adverse. The replication then concluded with a verification. To the forty-seventh plea, the plaintiff replied in substance the same three defences which were set forth in the replication to the forty-sixth plea.

Where a replication, besides a traverse of matter alleged in the plea, concluding to the country, also contained two separate answers to the plea, the Court set aside the replication except as to the traverse, on a summary application.

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Manning, Serjt., contended, that as the replications in question were bad on special demurrer, on the ground of duplicity, the proper course for the defendant to pursue was to demur, and not proceed by summary application. In *Griffiths v. Eyles* (a), where a rejoinder was bad for duplicity, and an application was made to strike it out, and it appeared that the pleading had begun by a traverse, concluding to the country, and then proceeded to state another answer to the replication, the Court refused to set aside the rejoinder, but left the plaintiff to his demurrer. There, *Eyre*, C. J., said, "This is but one rejoinder containing double matter; it may be a subject for demurrer, but not for the exercise of the summary jurisdiction of the Court." That was a direct authority in answer to the present application. By the course which the defendants adopted in applying to obtain the summary interference of the Court, they imposed a disadvantage on the plaintiff, to which he would not be subjected if they had demurred, as then the plaintiff might have objected to the defendants' pleas. No precedent could be cited for such an application as the present.

F. Robinson, in support of the rule. The only mode in which the defendants could remove the difficulty in which the mode of pleading adopted by the plaintiff, was by the present application. In the replication, the plaintiff had embodied three replications; a formal traverse, and two special replications, containing alleged answers to the pleas. The defendants could not treat these as nullities and sign judgment, for Reg. Gen., Hilary Term, 2 Wm. 4, pt. I. r. 34, only applied to "several pleas, avowries, and cognizances."

WILDE, C. J.—It appears to me that this is a proper application. These replications are in glaring violation of the rules in the practice and pleading. It is said, that the

(a) 1 B. & P. 413.

defendants may demur to them. To do so would be to incur delay and expense. I am, therefore, of opinion that the rule ought to be made absolute for setting aside these two replications, except so far as they traverse matter alleged in the pleas.

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COLTMAN, J., CRESSWELL, J., and WILLIAMS, J., concurred.

Rule absolute accordingly.

MATTHEW v. BROUGHALL.

S.C. - 5.03.937.

GASELEE, Serjt., shewed cause against a rule which had been obtained by **Byles**, Serjt., calling upon the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the record to deprive the plaintiff of his costs. The ground of the application was, that the defendant ought properly to have been sued in the Marylebone County Court of Middlesex, in pursuance of the 9 & 10 Vict. c. 95. The words of section 128 were, "that all actions and proceedings, which before the passing of this act might have been brought in any of her Majesty's superior Courts of Record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, &c., may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed." The present was an action for goods sold and delivered, and was tried before the sheriff of Middlesex. The plaintiff obtained a verdict for 16*l*. The affidavit in the present case did not shew that the plaintiff was not entitled to sue the defendant in a superior Court. The words of it were, "the said defendant

On an application to deprive a plaintiff of his costs under the 9 & 10 Vict. c. 95, s. 129, it is necessary that the affidavit on the part of the defendant should shew not merely that the cause of action arose within the jurisdiction of the County Court, but that the defendant was resident within the jurisdiction at the time when the action was brought.

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maketh oath and saith, that the plaintiff is a wholesale butcher, carrying on business in Newgate Market, in the city of London, which is within twenty miles of the place where the defendant lives and carries on his business; and deponent saith, that the defendant is a retail butcher, residing and carrying on business in High Street, Portland Town, in the parish of Marylebone, in the county of Middlesex; and deponent saith, that the cause of action arose within the jurisdiction of the Marylebone County Court of Middlesex, within which the defendant dwells and carries on his business, as he verily believes." It was quite consistent with the statement in this affidavit, that the defendant had come to reside within the jurisdiction of the Marylebone County Court of Middlesex since the action was brought. In *Thorne v. Jackson (a)*, the Court held, that it must distinctly appear on the face of the affidavit in support of such an application as the present, that the defendant was resident within the jurisdiction at the time when the action was brought.

Byles, Serjt., in support of the rule. The case clearly came within the meaning of the 60th section of the act. By that section it was provided, "that such summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at sometime within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts." In the present case, the affidavit shews that the cause of action arose within the jurisdiction of the Marylebone County Court of Middlesex.

✓ (a) *Ante*, vol. 4, p. 478; S. C. 3 C. B. 661. ✓

WILDE, C. J.—In order to support this rule, the affidavit must shew with distinctness that the defendant was resident within the jurisdiction at the time when the action was brought. That is not done in the present case; for it is quite consistent with the statements contained in this affidavit, that he came to reside within the jurisdiction of the Marylebone County Court of Middlesex, after the commencement of the suit. It does not negative the exception to be found in section 128.

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COLTMAN, J., CRESSWELL, J., WILLIAMS, J. concurred.

Rule discharged, with costs (*a*).

(*a*) The case of *Bailey and Others v. Robson*, in the same Term, is to the like effect.

Ex parte **LOWLESS and SON.**

S. C. 6. Ch. 123.

CHANNELL, Serjt., *S. Miller*, and *Huddleston*, shewed cause against a rule obtained by *Byles*, Serjt., calling upon a person named *Aflalo*, to shew cause why final judgment should not be signed and entered up for Messrs. Lowless and Son, for the sum of 834*l.*, the amount of the Master's allocatur, or for the sum of 88*l.* 2*s.* 6*d.*, as this Court should direct; or why the order of the late Lord Chief Justice, and the rule made thereon, should not respectively be amended, as to the Court should seem meet. It appeared from the affidavits in support of the application, that *Aflalo* had employed Messrs. Lowless and Son as his attorneys, in an action of *Phillips v. Aflalo* (*a*), and also, as his solicitors in a Chancery suit, wherein he was the real plaintiff, though a person named *Mantzqui* was the nominal one, the name

A Judge's order obtained at the instance of the client, referred an attorney's bill for taxation, reserving the question of retainer. The Master, by consent, decided that question in favour of the attorney, and made his allocatur for a certain amount. There was no undertaking to pay by the client in the order: *Held*, that the attorney was entitled to have judgment

(*a*) Reported 4 M. & G. 846.

entered up for the amount of the allocatur, under the 6 & 7 Vict. c. 73, s. 43.

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of that suit being *Mantzqui v. The St. Katharine's Dock Company*. Subsequently, Aflalo substituted as his attorneys Messrs. Hill and Mathews, and they on the 25th of June, 1845, obtained from *Cresswell, J.*, the following order:—

“In the matter of Messrs. LOWLESS and SON.

Mantzqui v. The St. Katharine's Dock Company.

“Upon hearing the attorneys or agents on both sides, I do order, that Messrs. Lowless and Son, within a fortnight, deliver unto Messrs. Hill and Mathews a bill of costs in this and all other causes and matters wherein they have been concerned for Mr. Mantzqui, and give credit therein for all sums of money received from or on account of the said Mr. Mantzqui.”

A similar order was also obtained in the cause of *Phillips v. Aflalo*. Messrs. Lowless and Son, on the 14th of July, 1845, in pursuance of this order, delivered their bill of costs, which contained their charges both in the action and the equity suit. Subsequently, on the 2nd of August, 1845, *Tindal, C. J.*, at the instance of Aflalo made the following order:—

“In the matter of LOWLESS and SON.

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“Upon hearing, &c., and by consent, I do order that the bill of costs delivered by Messrs. Lowless and Son, &c., be referred to the Master, to be taxed, without prejudice to the defendant disputing the retainer; that the Master tax the costs of such reference, and certify what may, upon such reference, be found due to or from either party in respect of such bill and demand, and the costs of such reference to be paid according to the event of such taxation, according to the statute; and that Messrs. Lowless and Son be restrained from commencing or prosecuting any action or suit touching their demand pending such reference.

N. C. TINDAL.

In obedience to this order the parties met on the 30th of October, 1845, before Henry Belward Ray, Esq., the senior taxing Master of this Court. It was then admitted on the part of Aflalo that Messrs. Lowless and Son had acted on his retainer in all the business except in the Chancery suit. Master Ray then called upon Messrs. Lowless and Son to prove the retainer in the Chancery suit, the parties having agreed to refer the question of retainer to him. After hearing both sides, he was of opinion that the retainer was satisfactorily shewn. It was then proposed by Aflalo's attorneys, that the taxation of the costs in Chancery should be referred to a taxing Master in equity, and also that it should be referred to him "to settle the point of retainer as to the Chancery costs." To this Messrs. Lowless and Son consented, and Master Ray made two separate requests in writing to the taxing Master in equity; first, that he would ascertain the amount to which Messrs. Lowless and Son were entitled, "without prejudice to the question of retainer;" secondly, that he would "determine whether the retainer was satisfactorily shewn." The parties appeared before Master Mills for the purpose of taxing the costs in equity, on the 10th of November, 1845. Master Mills, on the 28th of January, 1848, sent his certificate to Master Ray, of the amount at which he had taxed Messrs. Lowless and Son's costs, and also a separate memorandum in the following form:—

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"On the affidavits and other evidence laid before me, (and referring to the cases cited before me), I am of opinion that the retainer is made out in the first instance, and not withdrawn by the principal, or foreigner, Mantzqui, coming to England.

(Signed)

"R. M."

Subsequently Master Ray proceeded to complete the taxation of the costs at law; and less than one-sixth

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having been taken off the amount of the bill, the costs of taxation in favour of Messrs. Lowless and Son. His allocatur was as following :—

	£	s	d
Bill of Costs	1,319	4	5
Deducted on Taxation	177	14	5
	<hr/>		
	1,141	10	0

Costs of Taxation.

	£	s	d
In Chancery	73	16	7
In Common Pleas	14	5	11
	<hr/>		
	1,229	12	6
Received on Account	395	12	6
	<hr/>		
Balance due to Lowless and Son	834	0	0
Allowed. RAY.			

On this state of facts the present rule was obtained, in order to enable the plaintiff under the 6 & 7 Vict. c. 73, s. 43, to enter up judgment, either for the amount of the whole sum stated in the allocatur to be the balance due to the Messrs. Lowless and Son, or for the amount of the costs of taxation. The words of the section in question were, that "upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside, or altered by order, decree, or rule of Court,) be final and conclusive as to the amount thereof; and payment of the amount certified to be due, and *directed to be paid*, may be enforced according to the course of the Court in which such reference shall be made; and in case such reference shall be made in any Court of common law, it shall be lawful for such Court, or any Judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or

Judge shall deem proper." It would, therefore, be seen from the words of this section, that before the Court could exercise its discretion to deprive Aflalo of his right to have the question determined by a jury, with reference to his liability to pay the amount claimed, it was requisite, first, that the amount due should be certified; secondly, that that sum should be directed to be paid, and thirdly, that the retainer should be undisputed. No doubt a taxation had taken place. So far, therefore, the statute was complied with. But with reference to the second inquiry, it would appear that no order to pay was to be found either in the Judge's order or the allocatur. It was quite clear, therefore, that under the prior part of the section, no attachment could issue for nonpayment of costs. This had been decided *In re G. D. Woodhouse (a)*. The question then was, whether under the subsequent part of the section it was not equally necessary that an order to pay the sum found due ought to be made, before such an order as that now proposed could be made. It was submitted that it was equally necessary. Then as to the third requirement, that no dispute existed as to the retainer. Assuming that the parties had consented to the Master determining on the question of retainer, that would not deprive Aflalo of his right to raise the question as to negligence on the part of Lowless and Son in the conduct of the business, both at law and in equity. If, however, the order now prayed should be pronounced by the Court, Aflalo would be concluded upon that inquiry (b). [*Wilde, C. J.*—When the order was made one exception was introduced, which was as to the retainer. The effect of that single exception was to admit that, but as to that exception other matters between the parties were undisputed. The order to tax was obtained by Aflalo, and if he wished to reserve

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✓(a) 2 C. B. 290.

& W. 767; S. C. 1 Dowl. 924,

✓(b) *Matchett v. Parkes*, 9 M. N. S.

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the question as to negligence, he should have made it an exception in the order.]

Byles, Serjt., *Hoggins*, and *B. Hardy*, in support of the rule. The only question as to the right of Messrs. Lowless and Son to have the present rule made absolute, arose upon the words of the section, "such amount." Those words must mean the amount certified to be due by the Master; but if those words meant "directed to be paid," then the costs were sufficiently directed to be paid by the allocatur. The words of that were, "Balance due to Messrs. Lowless and Son, 834*l.* Allowed. RAY." With respect to the 88*l.* 2*s.* 6*d.* there was a clear direction in the order of *Tindal*, C. J., that that sum should be paid. With reference to the case *In re G. D. Woodhouse* (a), that was an application for an attachment, and, therefore, did not apply to the present case.

Cur. adv. vult.

WILDE, C. J.—We are of opinion that the terms of the Judge's order in this case, and the allocatur of the Master in pursuance thereof, authorize the Court, in their discretion, to order judgment to be entered up, under the 43rd section of the statute 6 & 7 Vict. c. 73, for the amount of the allocatur, unless the retainer is disputed.

We are further of opinion that the alleged client, Afalo, cannot be allowed to contend now that the retainer is disputed; inasmuch as the question of retainer has been conclusively settled by the decision of the taxing Master, to whose award, in effect, both parties submitted the dispute.

The only remaining question is, whether any matter has been shewn which ought to induce the Court, in the exercise of their discretion, to decline to make the order. It is said, that the client here has a good answer to the claim of the attorneys, by reason of their negligence in the con-

/(a) 2 C. B. 290.

duct of the business in respect of which the claim is made; and that he ought to be allowed to submit this defence to a jury. But we can find nothing in the affidavits which affords any real ground for this suggestion; nor any other ground on which we think we ought to decline to make an order for judgment, or to be induced to make any other order, under the concluding part of the 43rd section of the act.

The rule must, therefore, be absolute, to enter up judgment for the amount of the Master's allocatur.

Rule absolute accordingly.

MEETAN v. NICHOLLS.

SC 5. CB. 248

LUSH shewed cause against a rule obtained by *Talfourd*, Serjt., which called upon the plaintiff to shew cause why a suggestion should not be entered on the record, in order to deprive him of his costs in pursuance of the 9 & 10 Vict. c. 95, s. 129. It was an action of assumpsit to recover the amount of two bills of exchange for 11*l.* and 14*l.* each. The cause was tried at the Kingston Assizes on the previous Spring Circuit, and a verdict found for the plaintiff, damages 11*l.* The affidavit of the defendant stated that the cause of action arose within the jurisdiction of the County Court, and that the defendant, at the time when the action was brought, carried on his business within that jurisdiction, and also that the plaintiff and the defendant resided within twenty miles of each other. It did not, however, proceed to state that neither the plaintiff nor the defendant was an officer of the County Court. This it was submitted constituted a defect which disentitled the defendant to make the rule absolute. By section 58 a general jurisdiction was given to the Court in all personal actions where the debt or damage claimed was not more than 20*l.*, with certain exceptions mentioned in the proviso to that section. Then

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In order to entitle a defendant to deprive a plaintiff of his costs under the 9 & 10 Vict. c. 95, s. 129, it is requisite that the affidavit in support of the application should negative that the cause comes within any of the exceptions contained in section 128.

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by section 128, certain other exceptions to that general jurisdiction were introduced; among which were the exceptions stated in the affidavit, and also the exception "where any officer of the County Court shall be a party." Where any of those exceptions existed, the parties were in the same situation as if the statute had not passed, at the election of the party suing or proceeding. In order to deprive the plaintiff of his costs, to which he would be entitled, except where the exclusive jurisdiction of the statute attached, it was necessary to shew that the case was not one excluded from the operation of it by the provisions of section 128. That section was not properly a proviso, but an express enactment, saving the rights of parties in certain cases. If it was necessary to shew that the case did not come within one of the classes stated in section 128, it must be equally necessary to shew that it did not come within all.

Talfourd, Serjt., in support of the rule. The cases mentioned in section 128 must be considered in the nature of a proviso to the general enactment contained in section 58, and therefore, in order to render the present objection available, the statement in question ought properly to come from the other side. [*Wilde*, C. J.—Is there any difference between this part of the clause and the other part of it? If you may omit to negative one exception, may you not omit to negative all. But you do negative some. *Williams*, J.—Section 128 gives an option to the plaintiff, and not jurisdiction to the Court.] It was incumbent on the plaintiff to shew that he had such an option. [*Cresswell*, J.—The provisions of section 128 apply to certain particular causes of action. Then section 129 provides, "that if any action shall be commenced after the passing of this act in any of her Majesty's superior Courts of record, for any cause other than those lastly hereinbefore specified," "and a verdict shall be found for the plaintiff for less than 20*l*., if the said action is founded on contract;" the plaintiff shall be deprived of his costs. That being so, and a cause where an "officer of a

County Court shall be a party," being one of "those lastly hereinbefore specified," then the plaintiff is not deprived of his costs. But the defendant contends that he is a party not entitled to his costs. Is it not, therefore, necessary that he should disclose, on the face of his affidavit, that he is one of the persons not entitled to costs.] It was, no doubt, necessary that the Court should be satisfied before the plaintiff was deprived of his costs, that he did not come within any of those classes to whom the option of suing in the superior Courts was preserved. But the question was, who was to bring that fact before the Court? It was contended, that the defendant's affidavit was sufficient, in shewing that the plaintiff came within the general language of section 58, without proceeding to negative all the sections introduced in section 128. That section was in the nature of a proviso, although it occurred at a different part of the act from that in which the general enacting clause was found. If it was requisite to negative all the exceptions in this instance, it would be equally necessary to negative all the exceptions to be found in the proviso in section 58, of which there were no less than seventeen. [*Cresswell, J.*—The right to sue in the superior Courts, is, in fact, reserved to several persons, and that right is taken away from all others. It is, in fact, not properly an exception, but a distinct provision on those particular rights.]

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WILDE, C. J.—It strikes me that in order to deprive the plaintiff of his costs, you ought to shew that he is one of the parties whose right to sue in the superior Courts is taken away.

COLTMAN, J.—It has not been decided, that the exceptions contained in section 128 should be negatived, but it has been assumed to be necessary so to do. It seems to me that all the exceptions should be negatived.

CRESSWELL, J., concurred.

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WILLIAMS, J.—It appears to me that the defendant has not, by his affidavit, put himself in a situation to require the Court to deprive the plaintiff of his costs in the superior Court.

Rule discharged, with costs (a).

(a) See *Butler v. Corner*, Exch. Trinity Term, 1848, *post*, vol. 6.

S.C. 6. C.B. 115.

OWEN v. CHALLIS.

To an action of assumpsit for money had and received, the defendant pleaded that the money claimed in the declaration had been paid to him and others by the plaintiff as a deposit on shares allotted to him for the formation of a partnership, to carry on a railway scheme; that the ground of the plaintiff's action was that the scheme had not been prosecuted within a reasonable time; that after the passing of the 9 & 10 Vict. c. 28, it was, at a meeting held under that act, resolved that the undertaking should be abandoned, and the affairs of the partnership wound up; that they had not yet been wound up, nor had a reasonable time elapsed for that purpose: Held bad, as amounting to non assumpsit.

ASSUMPSIT. The declaration contained counts for money had and received, and on an account stated. The defendant pleaded as to 52*l.* 10*s.* parcel, &c., that before the passing of the statute of the 9 & 10 Vict. c. 28, entitled "An Act to Facilitate the Dissolution of certain Railway Companies," a prospectus had been issued for the provision of a certain intended partnership, for carrying into effect an undertaking for constructing a railway to be called The Direct Western Railway, which could not be constructed without the authority of Parliament, and that no act had been obtained for that purpose; that by the said prospectus, the defendant and several other named persons were declared to be a provisional committee; and it was also declared that the capital should consist of 300,000*l.*, divided into 120,000 shares of 2*l.* 12*s.* 6*d.* on each share allotted to them. That the defendant and the other members of the provisional committee were also the managers of the undertaking; that the plaintiff became a subscriber for twenty shares, which were allotted to him; and that the defendant and the other members of the committee received 2*l.* 12*s.* 6*d.* from the plaintiff in respect of each of such shares, amounting in all to 52*l.* 10*s.* That the plaintiff, the defendant, and the other shareholders

then entered into an agreement for the formation of a partnership for carrying on the undertaking; and that the plaintiff sought to recover the 52*l.* 10*s.* because the scheme was not prosecuted for a time which the plaintiff alleged to be unreasonable. The plea then went on to state, that after the passing of the statute 9 & 10 Vict. c. 28, the committee made the proper returns under the act, and called a meeting, and an adjourned meeting according to the provisions of the act, at which latter meeting the company and partnership were, according to the act, dissolved, and the prosecution of the undertaking abandoned and discontinued; and thereupon and by force of the statute the affairs of the company became liable to be wound up according to the rules applicable to partnerships dissolved by mutual consent of all the partners; and that the said sum of 52*l.* 10*s.* became subject to the resolution for dissolving the company, and that the plaintiff's claim in this action was part of the affairs of the company to be wound up as aforesaid, and that at the commencement of the suit the affairs of the company had not been wound up, nor had a reasonable time elapsed for winding up the same. Verification. To this plea the plaintiff demurred on various grounds, and among others that the plea amounted to non assumpsit.

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Pigott, in support of the demurrer. If the provisions of the 9 & 10 Vict. c. 28, were examined, it would be found that they afforded no answer to the present claim. If reference was made to section 25 of the statute, it would perhaps be contended that the language of that section relieved the defendant from liability at law; but the true construction of that section was, that the parties who were shareholders in the company should wind up its affairs as on a dissolution of partnership by consent, and thus to prevent them having recourse to equity in order to enforce a specific performance. But assuming that the statute did apply and did afford an answer to the action, the plea was bad, as

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amounting to non assumpsit. If the plea meant anything, it meant that the money which the plaintiff paid never was money had and received to his use. In no part of the plea was any colour given to the plaintiff, but it consisted of a substantial denial of the plaintiff's cause of action.

Willes, contra. The plea did give colour to the plaintiff as it admitted that before the passing of the statute of the 9 & 10 Vict. c. 28, there was an apparent cause of action vested in the plaintiff. It was analogous to the case of *Ward v. Robins* (a), and *Morant v. Sign* (b). Being good in point of form, it was also good in point of substance. The act was passed after the decision of the Court in *Walstab v. Spottiswoode* (c), in which case it was held that where a scheme similar to that stated in the present plea became abortive, the committee was liable to repay the deposits paid on shares. The object and the meaning of the statute were, that although the parties who had paid deposits were to be entitled to a proportionate share when the affairs of the concern were wound up, yet they were not to be permitted to bring an action for their deposits. The defendant was compelled to plead the statute, as it would not be available to him under the plea of non assumpsit. The plea was, therefore, good in substance and in form.

Pigott replied. The plea in the present case set up what, if it was a defence at all, shewed that the money received by the plaintiff was never received to the use of the defendant. It therefore gave no colour whatever to the plaintiff. It was mere avoidance without a confession. It was similar in principle to the case of *Solly v. Neish* (d). There to a declaration for money had and received to the use of the plaintiff a variety of facts were alleged, the result of which was that the money in the defendant's hands was

✓ (a) 15 M. & W. 237.

✓ (c) 15 M. & W. 501.

(b) 5 Dowl. 319; S. C. 2 M. & W. 95.

✓ (d) 4 Dowl. 248; S. C. 2 C. M. & R. 355.

the amount of the proceeds of the sale of goods, with a power of sale, pledged by certain persons with the plaintiff's knowledge, as a security for money to be advanced by the defendant, and that the defendant was willing to set off the proceeds of the goods which he afterwards sold, against the damages claimed by the plaintiff. There the Court expressed an opinion that the plea was bad as amounting to non assumpsit.

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WILDE, C. J.—This case comes before the Court upon a special demurrer to the plea.

The declaration was for money had and received. The plea states in substance that before the passing of the statute in the 9th and 10th year of her present Majesty, c. 28, entitled "An Act to Facilitate the Dissolution of certain Railway Companies," a certain prospectus had been issued for the promotion of a certain intended partnership for carrying into effect an undertaking for constructing a railway to be called The Direct Western Railway, which could not be constructed without the authority of Parliament; and that no act of Parliament has been obtained for that purpose. That by the said prospectus the defendant and several other named persons were declared to be a provisional committee; and it was also thereby declared that the capital should consist of a certain amount therein mentioned, to be divided in the number of shares therein also mentioned; and that the allottees of such shares should pay 2*l.* 12*s.* 6*d.* upon each share allotted. That the defendant and other members of the provisional committee had the management of the undertaking; and that afterwards, at the request of the plaintiff, twenty shares were allotted to him, and that the defendant and the rest of the committee received from him 2*l.* 12*s.* 6*d.* upon each share. It further states that the plaintiff and the defendant and divers other persons entered into an agreement of partnership for carrying the said undertaking into effect, and that

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the 2*l* 12*s*. 6*d*. a share upon the twenty shares allotted to the plaintiff, making 52*l* 10*s*. so paid by the plaintiff, is sought to be recovered in this action by reason of the undertaking not being prosecuted for a time which the plaintiff alleges to be unreasonable. The plea then proceeds to set forth that meetings of the shareholders were called and held according to the provisions of the statute before mentioned, at which meetings in the manner prescribed by and according to the directions of the statute, the company or partnership was dissolved, and the prosecution of the undertaking abandoned and discontinued; and thereupon, by force of the said statute, the affairs of the company became liable to be wound up according to the rules applicable to partnerships dissolved by mutual consent of all the parties; and that the sum of 52*l* 10*s*. was subject to the resolution for dissolving the company. And that the plaintiff's claim in the action is a part of the affairs of the company to be wound up as aforesaid, and that at the commencement of the suit the affairs of the company had not been wound up, nor had a reasonable time elapsed for winding up the same. The plea concludes with a verification.

To this plea the plaintiff has specially demurred, assigning several causes of demurrer, and among them that the plea amounts to the general issue.

The Court is of opinion that the plea is bad on that ground, and it therefore becomes unnecessary to advert to the other causes of demurrer.

The general issue of non assumpsit in an action for money had and received operates as a denial both of the receipt of the money and of the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. Upon reference to the plea it will be seen that the facts therein stated are set forth to shew that the money sought to be recovered never was received by the defendant to the use of the plaintiff, and is therefore an argumentative traverse of the implied promise stated in

the declaration, which is, in effect, the general issue, and all those facts might be given in evidence under non assumpsit.

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The case is similar in principle to that of *Solly v. Neish* (a), where, in an action for money had and received, the plea set forth the circumstances under which the money sought to be recovered was received by the defendant, and from those circumstances claimed a right of set-off, the plea was held to be bad, as amounting to the general issue. The case also of *Clark v. Dignam* (b) is in point. In that case the general issue had been pleaded to an action for money had and received, and it appeared that the money sought to be recovered had been received by the defendant as attorney in an action brought in the plaintiff's name against one Duncombe; and the defendant proved that the plaintiff had allowed his name to be used in such action, at the request of Edwards, who really employed the defendant, and who was indebted to the defendant in an amount exceeding that claimed by the plaintiff, and which the defendant therefore claimed as a set-off. It was objected, on the part of the plaintiff, that as the defendant had acted as attorney on the record for the plaintiff, the defendant ought to discharge himself by proving payment to Edwards; but *Parke, B.*, said, "No; it all arises on the general issue; the defendant disputes all the facts from which the legal inference arises that the money was money had and received to the use of the plaintiff;" which was assented to by the Court.

In the present case the whole object and effect of the plea is to shew that the promise stated in the declaration will not be implied in law from the facts and circumstances set forth in the plea. Therefore there must be

Judgment for the Plaintiff.

✓(a) 2 C., M. & R. 355.

✓(b) 3 M. & W. 478.

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J. C. S. 5, 213. 255.

RIZZI v. FOLETTI.

Where a peremptory undertaking to proceed to trial at a particular sittings is given, and the cause is duly entered for those sittings, but it is made a remanet by the Court, that is not a breach of the plaintiff's undertaking, and, therefore, the defendant is not entitled to judgment as in case of a nonsuit.

CHARNOCK shewed cause against a rule obtained by *Bramwell*, to discharge a rule absolute in the first instance for judgment as in case of a nonsuit, which had been obtained by the defendant. It appeared, that issue was joined on the 22nd of April, 1847, and that three successive notices of trial were given in June and November, and that they were all countermanded. On the 17th of November, a rule nisi for judgment as in case of a nonsuit was obtained by the defendant, which was discharged on the 23rd of November, on a peremptory undertaking to proceed to trial at the London sittings, after Michaelmas Term. On the 2nd of December, the cause was duly entered for trial, but in consequence of the quantity of business in the Court it was not reached, and it was made a remanet until the sittings after Hilary Term, 1848. On the 17th of January, a rule absolute in the first instance for judgment as in case of a nonsuit was obtained by the defendant, and subsequently, the present rule nisi was granted to discharge the last mentioned rule. The question was, whether the rule absolute so obtained was irregular. The cases, it was submitted, shewed that it was regular. Thus, in *Ward v. Turner* (a), it was in effect decided, that a peremptory undertaking to proceed to trial was an undertaking to proceed to trial at all events, as there it was held, that the sudden illness of the Judge which prevented his sitting, and therefore trying the cause, was not a sufficient excuse for not proceeding to trial. So in *Petrie v. Cullen* (b), where a peremptory undertaking had been given, and the cause was made a remanet, and judgment as in case of a nonsuit was

✓(a) 5 Dowl. 22.

8 Scott, N. R. 705; 7 M. & G.

✓(b) *Ante*, vol. 2, p. 604; S. C. 1020.

afterwards signed, the Court refused to set aside that judgment. There *Maule*, J., put a construction on the undertaking of the plaintiff similar to that adopted in *Ward v. Turner*. No doubt in *Lumley v. Dubourg* (a), the Court of Exchequer took a different view, and held, that under such circumstances a default had not been committed. To the same effect was the case of *Rogers v. Vandercom* (b), where the Judge sitting in the Bail Court ruled in conformity with the decision of the Court of Exchequer; but as there was a variance between the authorities, this Court would adhere to its own decision.

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Bramwell, in support of the rule. The cases of *Rogers v. Vandercom*, and *Lumley v. Dubourg*, were more in conformity with the principle than the cases of *Petrie v. Cullen*, and *Ward v. Turner*; the object of the statute was to punish the defendant for the consequences of his neglect, but it could not be said that the plaintiff had been guilty of neglect, when he had made use of every means in his power to try the cause, but the delay of the Court prevented him from so doing.

Cur. adv. vult.

CRESSWELL, J.—In this case, a rule for judgment as in case of a nonsuit was discharged upon a peremptory undertaking. It appears, that the plaintiff duly entered the cause for trial, and did all he could to procure it to be tried pursuant to his undertaking; but the Court did not arrive at the case, and, therefore, it was not tried. On the second day of last Hilary Term, the defendant obtained a rule absolute for judgment as in case of a nonsuit. A motion was afterwards made to set aside that rule, and to enlarge the peremptory undertaking,—founded upon the

✓ (a) *Ante*, vol. 3, p. 80; S. C. 14 M. & W. 295. ✓

✓ (b) *Ante*, vol. 4, p. 102.

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case of *Lumley v. Dubourg* (a). That rule was resisted, on the supposed authority of *Petrie v. Cullen* (b), in this Court. In the last mentioned case, it appeared that the plaintiff had not made due endeavours to perform the undertaking into which he had entered; and upon that ground, *Tindal*, C. J., thought he was not entitled to relief. *Maule*, J., went further, and expressed an opinion that a party entering into such a rule undertakes at all events, and without any reservation or exception, that the trial shall take place within the time limited. The case of *Lumley v. Dubourg*, occurred after that decision: and there, the Court of Exchequer, after conferring with the Chief Justice, held, that the cause having been made a remanet without any neglect or default on the part of the plaintiff, the defendant was not entitled to a rule absolute for judgment as in case of a nonsuit. We have communicated with the Judges of the Court of Exchequer, and we all think that *Lumley v. Dubourg* ought to be adhered to for the future. But, as the parties in this case appear to have proceeded upon the expression of opinion in *Petrie v. Cullen*, we think the rule for setting aside that rule must be made absolute, without costs.

Rule absolute, without costs.

(a) 14 M. & W. 295; S. C. *ante*, vol. 2, p. 604; 8 Scott, *ante*, vol. 3, p. 80. N. R. 705.

(b) 7 M. & G. 1020; S. C.

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2. The provision in the 4 Anne, c. 16, s. 11, "that no dilatory plea shall be received" unless verified by affidavit, is introduced for the sole benefit of plaintiffs; and a plaintiff may therefore waive, if he so chooses, an irregularity in, or the omission of, any such affidavit. *Graham and Another v. Ingleby and Glover*, 737

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Where an order for leave to amend is made upon payment of costs, and the costs are taxed and ascertained by the Master's allocatur, the party, in order to avail himself of the leave to amend, must tender the full amount of the allocatur, and not a less sum; although he may be prepared to shew that a mistake has been made in allowing certain items.

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3. In an action of assumpsit against two executors, the plaintiff discovered, after plea by the two, that there was a third joint executor. The Court refused permission to amend the writ and declaration by inserting the name of the third executor as co-defendant; although a fresh action would be barred by the Statute of Limitations. *Goodchild v. Leadham and Another, Executors*, 383

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2. A pauper, who was a married woman, and whose husband had deserted her, was removed, under an order of removal, to the place of her maiden settlement, on the 26th of September, 1846. An appeal was

entered and respited at the Michaelmas Sessions. The appellant township, on the 1st of December following, obtained a warrant for the arrest of the husband, who was not apprehended till the 24th of that month, and, consequently, too late to give notice of appeal for the Epiphany Sessions. At those sessions, however, the appellant parish appeared and asked to have the appeal respited, on statement of these facts, to the Easter Sessions. The Epiphany Sessions having called the respondents before them, and heard their objections, namely, that no notice of appeal having been given, the sessions had no power to respite the case; and, that even if they had, they would not consider the circumstances such as to call upon them to exercise it; made an order respiting the appeal to the Easter Sessions, on payment of the costs of the day by the appellants, without prejudice to the objection of want of notice of appeal. A valid notice of appeal was given for the Easter Sessions, and on the case being called on, the objection was renewed, that no notice had been given for the Epiphany Sessions; and the sessions decided that the objection was fatal: *Held*, that the Epiphany Sessions had clearly power to respite, if in their discretion they thought fit; and that they must be taken to have exercised their discretion, reserving the question of their power; that the Easter Sessions had therefore decided wrongly; and that a mandamus would lie to the sessions to enter continuances and hear the appeal. *Reg. v. Justices of Lancashire, (Butley v. Ashton-under-Lyne),* 264

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2. Where a cause and all matters in difference were referred at nisi prius, the arbitrator to have power to direct a verdict for either party, and neither party to bring a writ of error, but no power to direct judgment non obstante veredicto was given: *Held*, that the arbitrator had no power to direct such a judgment, and the Court refused to order such a judgment to be entered.

The award directed a verdict to be entered for the plaintiff on certain issues, with 1s. damages, and continued, "which sum, except for my finding on the other issues, the plaintiff would be entitled to recover in the said cause:" *Held*, that the award was final as to the damages.

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2. The Scotch Bankrupt Act, 2 & 3 Vict. c. 41, s. 18, enacts, that a warrant of protection granted to a bankrupt under that act, "shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland, and her Majesty's other dominions, for civil debt," &c., "but such warrant of protection or liberation

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shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ*, or *ad factum præstandum*, or for any criminal act." A defendant having a warrant of protection under this statute, was arrested in England on a *capias* issued under the 1 & 2 Vict. c. 110, s. 3, on an affidavit that he resided in Scotland, and was about to quit England to return to that country: *Held*, on motion to discharge him out of custody, that a *capias* so issued was not a "warrant of arrest" "in *meditatione fugæ*" within that section, and that the defendant was therefore entitled to his discharge. *M'Gregor v. Fishin*, 591

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2. Where an attorney had omitted to take out a certificate for upwards of ten years, and had given the notices required in order to take it out at the end of the Term, pursuant to Reg. Gen., Easter Term, 9 Vict.; the Court refused, although special grounds were stated for the application, to allow him, on the first day of the Term, to

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take out his certificate forthwith. *Ex parte Barnes*, 294

3. A rule to strike an attorney off the roll on the ground that he has been convicted of conspiracy, and struck off the roll of the Queen's Bench, is a rule nisi, which will make itself absolute in a certain time, unless the party shews cause to the contrary. *In re Wright*, 394

4. Where a party has conducted a cause in person, it is not necessary, in order to enable him to take a step in the cause by attorney, that he should obtain an order for the purpose, or that he should give the other side previous notice of the appointment of the attorney. Taking the step by attorney is in itself a sufficient notice to the opposite party of the appointment. *Jones v. King*, 412

ATTORNEY (ADMISSION OF).

See ATTORNEY, 1, 2, 3.

Where little more than a twelvemonth had elapsed since the admission of an attorney, the Court, under special circumstances, allowed him to take out a certificate, without giving the notices required by Reg. Gen., Easter Term, 9 Vict. *Ex parte Thomas Wyse Weymouth, Gent., one, &c.*, 60

ATTORNEY (BILL OF).

The defendant, a London attorney, employed the plaintiff, also a London attorney, to go to Cambridge and defend a person indicted for bribery at an election there. In 1841 and 1842, the plaintiff delivered to the defendant bills of costs unsigned, and in February 1847, he re-delivered signed bills: *Held*, that the bills were taxable under 6 & 7 Vict. c. 73, s. 37. *In re Billing, Gent., one, &c., and in a cause between Billing and Coppock*, 126

ATTORNEY AND CLIENT.

Where a defendant has been served with process, and an attorney, without

authority, appears for him, if the attorney be insolvent, the defendant will be relieved upon equitable terms, provided he has a defence upon the merits. But if the attorney be solvent, the defendant will be left to his remedy by summary application against him.

But where a plaintiff, without serving the defendant, accepts the appearance of an unauthorized attorney, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and expenses from the delinquent attorney. *Bayley and Another, Executors of T. K. Bayley v. Buckland, Gordon and Others*, 115

ATTORNEY (LIEN OF).

An attorney has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs.

And the Court will not interfere with that lien, by ordering him to deliver up those papers, on payment of the bill of costs in the particular suit: although the bill of costs has been made out and delivered separately; and the client suggests that the possession of the papers is necessary to enable him to carry on the proceedings, and that he will be damaged by the delay. *In the matter of Henry Broomhead, Gent., one, &c.*, 52

AUDITA QUERELA.

1. In an auditâ querelâ, a rule for a supersedeas and venire facias is absolute in the first instance. *Giles v. Hutt and Another*, 115

2. A defendant, in auditâ querelâ, may plead several matters, by leave of the Court; it being "an action or suit," within the meaning of 4 & 5 Anne, c. 16, s. 4. *Giles v. Hutt and Another*, 387

BANKRUPT.

See DECLARATION, 3.

The stat. 5 & 6 Vict. c. 116, s. 1, takes away from a party, presenting a petition for protection from process under that statute, the right to sue for an outstanding debt; and confers it, till final order, on the official assignee.

Plea to an action of indebitatus assumpsit for wages as a hired servant, and on an account stated, that, after the accruing of the causes of action, and before the passing of the 7 & 8 Vict. c. 96, the plaintiff had presented a petition for protection from process under the 5 & 6 Vict. c. 116, s. 1; and that an official assignee had been appointed, in whom his estate and effects were vested. The plea set out all the facts necessary to render the order valid under that section: *Held*, on demurrer, that the plea was a sufficient answer to the action.

Held, on special demurrer, that it was not necessary that the plea should contain a positive averment that the plaintiff had creditors, or that the schedule which he presented contained the debt sued for.

Nor that it should negative that the suit was brought on behalf of the official assignee, and with his consent.

Nor that the notice of the plaintiff's intention to present the petition should be stated to have been given after the passing of the act; it being expressed to be given "according to the schedule to the said first mentioned act annexed, and according to the true intent and meaning of the said first mentioned act."

Nor that the time when the matter of the petition was to be heard, should be stated to have been advertised in the *London Gazette*, &c., "one month at the least" after the date of the notice.

Nor that the order of the Court of Bankruptcy, which appointed the commissioner who granted the order for
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protection, should be stated to have been approved of by the Lord Chancellor. *Sayer v. Dufaur*, 313

BANKRUPT (SCOTCH).

See ARREST, 2.

The defendant, who carried on business in partnership in Scotland, was arrested in England on the 17th of March, 1848, upon a *capias* issued under the 1 & 2 Vict. c. 110, s. 3. On the 20th of March, the Lord Ordinary made an order on the petition of the partnership firm, sequestrating their estate, appointing two meetings of creditors, and granting to the defendant a "warrant of protection" "against arrest or imprisonment for civil debt." *Held*, that this was a warrant of protection from arrest, under the 13th section of the 2 & 3 Vict. c. 41, (Scotch Bankrupt's Act), and not a warrant of liberation under the 17th section; and that as the defendant was in custody at the time it was granted, it was inoperative to discharge him. *McGregor v. Fiskin*, 722

BASTARD.

1. An order in bastardy for the payment of expenses of the maintenance of an illegitimate child, under the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 10, whether the defendant appears in person or by attorney, to answer the complaint of the woman before the justices, should state on the face of it, that the evidence was given "in the presence and hearing" of the defendant, or of his attorney, as the case may be; and if, *after appearance*, there is any special reason for omitting that statement, it should be suggested on the face of the order.

Where in an order drawn up on a printed form under the 8 & 9 Vict. c. 10, it was stated that the putative

father appeared before the justices in pursuance of the summons: but the words "in the presence and hearing of the said," &c. (after the statement of the proof being given and the evidence received) were struck out: *Held*, on motion for a certiorari, that the order was bad, and that the Court would not presume, these words being struck out, that the proof and evidence were nevertheless received and given in the presence and hearing of the putative father, or of his attorney. *Regina v. Duke of Grafton and Others, Justices, &c.*, 568

2. On an appeal to the quarter sessions, by the putative father, against an order of maintenance, the 8 & 9 Vict. c. 10, s. 6, requires the justices, "on the trial of any such appeal," to "hear the evidence of the mother." *Held*, that the proof that notice of appeal had been given to her, was part of "the trial" of the appeal; and that, therefore, she might be called as a witness to prove that fact.

An order of maintenance under the 7 & 8 Vict. c. 101, was made at five o'clock in the afternoon of Saturday. At ten o'clock on Monday morning, notice of appeal was served on the mother: *Held*, that the notice was given in sufficient time, as the twenty-four hours prescribed by the 7 & 8 Vict. c. 101, s. 4, within which notice of appeal is to be given, must be reckoned exclusive of Sunday.

The 7 & 8 Vict. c. 71, s. 2 (Criminal Justice [Middlesex] Act), enacts, that the adjourned sessions in Middlesex "shall be general sessions of the peace," and "shall have power to try and determine all appeals, and all other powers which "belong to the general quarter sessions." *Held*, that the jurisdiction thus given was optional only; and that the putative father was not bound to appeal to those sessions, but might wait and appeal to the general quarter sessions. *Regina v. Justices of Middlesex*, 580

BILL OF EXCHANGE.

See COUNTY COURT, 2.

Payment within the 55 Geo. 3, c. 184, s. 19, of a bill of exchange, so as to render it no longer negotiable, must be a payment by the party ultimately liable.

Therefore, where a bill of exchange, indorsed in blank by the drawer, was overdue and unpaid, and an action had been commenced by C. the holder, against the acceptor, and the plaintiff, who was a stranger to the bill, paid the amount of the bill and costs to C., who delivered the bill to him : *Held*, that the plaintiff might maintain an action on the bill against the drawer ; and that the bill did not require a fresh stamp, as being re-issued after payment.

In an action by indorsee against drawer of a bill of exchange, *Held* that the issue that the bill was accepted for the accommodation of the defendant, was proved by evidence that the bill had been accepted to take up a former acceptance by the same party, given for the accommodation of the defendant ; and that it was not necessary to plead those facts in extenso.

A declaration by indorsee against drawer of a bill of exchange, averred by way of excuse for want of notice of dishonour that C. F. accepted the bill for the accommodation of the defendant, and that at the time of making and accepting the said bill, and from thence until and at the time when the same was so presented for payment, C. F. had not any effects of the defendant, nor had he received any consideration for the acceptance or payment of the said bill, nor had the defendant sustained any damage by reason of his not having had notice of the nonpayment thereof : *Held*, on motion in arrest of judgment, that it was not necessary that the declaration should deny that the drawer had any

reasonable expectation when he drew, or during the currency of the bill, that he would have assets at the time of its maturity in the hands of the drawee.

The reasonable expectation of assets entitles to notice only on the ground that the drawer, under the circumstances which raise that expectation, may be damnified : to allege, therefore, that he has sustained no damage, removes the ground on which the necessity of notice arises.

And there is no distinction in this respect between a bill of exchange and a banker's cheque. *Thomas v. Fenton*,
28

BROKER.

See SEVERAL PLEAS.

BUILDING SOCIETY.

See COUNTY COURT, 13.

CASE.

See PLEA, 14.

CATTLE GATE.

See EJECTMENT, 1.

CAUSE OF ACTION.

See COUNTY COURT, 14.

CERTAINTY.

See DECLARATION, 2.
PLEA, 13.

CERTIORARI.

See BASTARD, 1.

1. A certiorari will not lie to bring up a resolution of vestry for the appointment of paid constables under the 5 & 6 Vict. c. 109, s. 18.

Nor the copy of such resolution

forwarded to the justices in special sessions, on which they made the appointment.

But it will lie to bring up the appointment itself made by the justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to the 58 Geo. 3, c. 69, amended by the 59 Geo. 3, c. 85, a poll having been demanded and refused, and the resolution being carried by a show of hands.

A certiorari being granted for that purpose, it is competent to the parties moving to shew upon affidavit that the irregularity in the proceedings of the vestry was of such a nature as to take away the jurisdiction of the justices. *In re Constables of Hipperholme cum Brighouse*, 79

2. An appeal having been called on at the sessions, and the appellants not appearing, (having served a notice of abandonment of the appeal upon the respondents), the sessions, at the instance of the respondents, made an order in the following form:—

"Surrey, to wit. At the general quarter sessions of the peace of our Sovereign Lady the Queen, holden at St. Mary, Newington, on Tuesday," &c. After reciting, that "at the last general quarter sessions of the peace holden in and for the county of Surrey, appeal was then made unto this Court," &c., and that it was respited "until the next general quarter sessions of the peace to be holden in and for the said county of Surrey:" "Now," &c., "it is ordered by this Court," &c., that the appeal be dismissed, and "it is further ordered, that the said appellants do forthwith pay to the said respondents the sum of 115*l.* costs."

Held, on motion for a certiorari, that it was not necessary that notice should have been given to the appellants that more than nominal costs would be applied for; although it was stated upon affidavit that it was the practice at the sessions not to give

more, unless under very particular circumstances.

Held also, that it sufficiently appeared to be a quarter sessions holden "in and for" the county.

Held also, that it was sufficiently shewn that the costs awarded, were costs in respect of the appeal. *Ex parte The London, Brighton, and South Coast Railway Company*, 597

CHARGING IN EXECUTION.

It is no cause to shew against a motion to charge a defendant in execution, who has been brought up on a writ of habeas corpus ad satisfaciendum, that the warrant of attorney on which the judgment has been signed, was given without consideration, and the judgment signed in breach of good faith. Such facts are the proper grounds of a substantive motion to set aside the warrant of attorney and judgment and subsequent proceedings, and to discharge the defendant out of custody.

The Court will, therefore, not postpone the motion to charge the defendant in execution, until the other rule comes to be discussed. *Cooke v. Wright*, 274

CHEQUE.

See VENUE, 1.

CHRISTIAN NAME.

See DEMURRER (FRIVOLOUS).

COGNOVIT.

After writ issued, and before appearance entered, the defendant gave a cognovit in the common form. Upwards of seven years afterwards, the plaintiff entered an appearance for the defendant in the action, and signed judgment on the cognovit. *Held*, that he might properly do so without giving a Term's notice, or applying for leave to the Court or a Judge.

CONSIDERATION.

A party coming to the Court to rescind an order of a learned Judge, and succeeding, will not be allowed to make a subsequent separate application to have the costs repaid, which he has paid under the Judge's order. *Thompson v. Langridge*, 213

COMMISSION TO EXAMINE WITNESSES.

Where the Court of Chancery had directed an issue to be tried in this Court, and also directed that a witness then abroad should be examined on interrogatories, this Court refused to vary the order of the Court of Chancery, by directing that the plaintiff should be at liberty to cross-examine the witness, *vivâ voce*, before the Chancery commissioner; or to issue a separate commission to cross-examine the witnesses under 1 Wm. 4, c. 22, s. 4. *Hargrave v. Hargrave and Others*, 151

COMPANY.

See DECLARATION, 2, 4.

PLEA, 15, 20.

SCIRE FACIAS, 2, 3, 5, 6.

CONSENT RULE.

The undertaking of the lessor of the plaintiff, in the common consent rule, to pay costs, is only personal, and cannot be enforced at the instance of the defendant's administrator.

Semble, that where a rule has the force of a judgment under the 1 & 2 Vict. c. 110, s. 18, it is not necessary that a rule should be served calling on the party in default to shew cause why he should not pay the amount mentioned in the rule. *Doe dem. Harrison v. Hampson*, 484

CONSIDERATION.

See DECLARATION, 2.

COSTS.

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CONSPIRACY.

See ATTORNEY, 1, 3.

CONSTABLE.

See CERTIORARI, 1.

CONSUL.

See MARRIED WOMAN, (ACKNOWLEDGMENT OF), 3.

COPYHOLD.

See COURT ROLLS.

COPYRIGHT.

See SEVERAL COUNTS, 3.

CORONER.

See QUO WARRANTO.

CORPORATION.

Where a private act of Parliament, constituting a railway company, provides that the directors may "appoint or displace any of the officers of the company;" the appointment of an attorney to the company need not be under seal. *Regina v. The Justices of Cumberland*, note (a) 431

COSTS.

See COUNTY COURT, 2.

EXECUTION.

MANDAMUS, 1, 2.

Trespass. The first count of the declaration was for trespasses committed in three closes, A. B. and C. The second count, for trespass in a fourth close. The defendant pleaded not guilty to the whole. He also pleaded to the first count a public way over A. B. and C., and other pleas. The plaintiff traversed all the other pleas, and also the plea of public way, so far as it related to A. and B., and new assigned trespasses extra

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viam as to C. The jury found for the defendant on not guilty as to the second count, and also on the plea of public way as to closes A. and B. The plaintiff had a verdict on all the other issues, and on the new assignment, on which the jury assessed his damages at one farthing. The Judge did not certify under the 3 & 4 Vict. c. 24: *Held*, that the plaintiff was entitled to have taxed for him the costs of the issues found in his favour as to closes A. and B.; but that under the 3 & 4 Vict. c. 24, he was not entitled to any costs upon any of the issues as to close C., with regard to which he had succeeded, but had recovered less than 40s. damages. *Sharland v. Loaring*,

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COSTS OF THE CAUSE.

1. A declaration in assumpsit contained two special counts, a count for work and labour, and a count upon an account stated. Pleas, first, as to the whole, non assumpsit; second, a plea of justification to the first count; third, a plea of justification to the second count; fourth, to the fourth count, payment. Verdict on the plea of non assumpsit, for so much as related to the first, third, and fourth counts for the defendant, and upon the special pleas and non assumpsit to the second count for the plaintiff. Judgment was afterwards arrested on the second count. *Held*, that the Master was right in allowing the defendant the general costs of the cause; and in disallowing the plaintiff the costs of witnesses called by him in support of the issue on which he was successful, but which witnesses were not exclusively applicable to it. *Elderton v. Emmens*,

489

2. A party succeeding on an issue which entitles him to the postea and the general costs of the cause, is entitled to the costs of all witnesses attending to prove that issue, whether their evidence applies to any other

COUNTY COURTS.

issue or not. But the opposite party is entitled only to the costs of such witnesses as attend solely to prove the issue on which he succeeds, and if they also attend to prove an issue, on which he fails, he is not entitled to any costs in respect of them. *Welby v. Brown*,

746

COSTS OF THE DAY.

After the jury were sworn to try a cause, it was discovered, that through the mistake of the clerk of the plaintiffs' attorney, a replication to one of the pleas, and the award of venire, were omitted in the nisi prius record; although the issue delivered was correct.

Held, that the Judge had power to amend the record with the consent of the parties.

The defendants having refused to give their consent to any amendment being made, and the Judge at nisi prius having thereupon ordered the jury to be discharged; the Court refused, in the exercise of their discretion, to grant the defendants the costs of the day.

The rule for costs of the day being a rule absolute in the first instance, the opposite party is not bound to appear to shew cause, although notice of the motion may be given to him; but may come afterwards and move to discharge the rule. *Sleeman and Others, Assignees v. The Governor and Company of the Copper Miners of England*,

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COUNTY COURT.

See NUL TIEL RECORD.
PROHIBITION.

1. On the 21st of July, 1847, the Judge of a County Court, in a plaint under the 122nd sect. of the County Court Act, (9 & 10 Vict. c. 95), gave judgment that the defendant should deliver up possession of the premises on the 24th of December following.

No warrant of possession was drawn up or executed. On the 31st May, 1848, a fresh plaint was brought to recover possession of the same premises, between the same parties, on the same notice to quit; and judgment given in the plaintiff's favour.

Held, on motion for a prohibition, that as the rules and forms framed by the Judges under the 78th sect. of the act contain a form of a judgment (No. 30) which orders possession to be delivered "forthwith," the Judge had no authority to pronounce a different judgment; that the first judgment was therefore a nullity, and that the plaintiffs might treat it as such, and institute the second plaint; and that they were not bound to apply to the Judge of the County Court to amend his former judgment.

It is sufficient to bring a case within the 122nd sect., that the yearly rent is under the value of 50*l.*, and that no fine has been paid; even if the actual value of the premises be beyond that sum. *Fearon and Another v. Norvall*, 445

2. An action on a bill of exchange to recover less than 20*l.* is within the 129th section of the 9 & 10 Vict. c. 95, and not within the 128th section; and therefore, a plaintiff, bringing it in a superior Court, is not entitled to costs.

On a motion to enter a suggestion to deprive the plaintiff of costs in such an action, it is not necessary that the affidavits in support of the motion should shew that the Judge, before whom the cause was tried, did not certify that it was a fit action to be brought in the superior Court. *Nind v. Rhodes*, 621

3. In a plaint in the County Court, the defendants pleaded the Statute of Limitations, but without giving the notice required by the 10th rule, framed by the Judges, under the 9 & 10 Vict. c. 95, s. 78. The plaintiff required an adjournment of the case, in order to answer the plea; which

was granted, and the case adjourned to a subsequent day. On that day, the case came on for hearing, and the defendants obtained a judgment in their favour, which was entered by the clerk of the County Court in the book kept for that purpose. The defendants then left the Court. Some days afterwards they received notice that the Judge had rescinded his judgment, and that the case was adjourned for further hearing. They attended on the day named, and protested against any further hearing of the case. The Judge, however, overruled their objection, and gave judgment for the plaintiff, on the ground that the plea of the Statute of Limitations, on the former occasion, had been improperly pleaded. On motion for a prohibition, *Held*, that the Judge had no authority to rescind his former decision in the absence of the defendants; that he had therefore acted without jurisdiction, and that a prohibition must go.

Seemle, that a Judge of a County Court may alter his judgment, after it has been pronounced and recorded in the book of the Court kept for that purpose; if he do so at the same Court, and in the presence of the parties. *Jones v. Jones and Another*, 628

4. After a decision in the plaintiff's favour in the County Court, before the Judge alone, an application for a new trial to be had before a jury, was made by the defendant. The plaintiff opposed the application, and objected that, under the 20th rule as framed by the Judges under the 78th section of the County Courts' Act, the Judge had no power to order a new trial by jury, where the first trial had been decided by the Judge alone. The Judge, however, made an order for a new trial by jury, on payment of costs; and a new trial was accordingly had, and a verdict returned for the defendant: *Held*, that the plaintiff, by accepting the costs under the

Judge's order, had waived his right to object to the second trial.

Quere, if the Judge of the County Court, under these circumstances, had any power to make such an order? *Sparrow v. Reed*, 633

5. On the 23rd of December, 1846, a plaint was heard and determined in a County Court, in the absence of the defendant, it being proved to the satisfaction of the Judge of the Court that the original summons had been duly served on the defendant as required by the 11th rule, made by the Judges of the superior Courts, under the 78th section of the County Courts' Act. On the 13th of January, 1847, the defendant moved for a new trial, on the ground that the requisitions of the 11th rule as to service had not been complied with. Witnesses were heard on both sides, and the Judge decided that he was satisfied that the rule had not been complied with, but that he was of opinion, under the circumstances, that the objection had been waived; but offered to grant a new trial on an affidavit of merits: *Held*, no ground for a writ of prohibition to issue.

Semble, that a compliance with the terms of the 11th rule, which requires that it shall be proved, to the satisfaction of the Judge, that the service of the summons had come to the knowledge of the defendant ten clear days before the return day of the summons, is not a condition precedent necessary to give jurisdiction. *Zohrab v. Smith*, 635

6. The County Courts' Act, 9 & 10 Vict. c. 95, does not take away the privilege of an attorney plaintiff, and subject him to the risk of costs, if he sue in a superior Court, for a cause of action for which he might have sued in the County Court. *Lewis v. Hance*, 641

7. The privilege of an attorney defendant to be sued in the superior Court of which he is an attorney, is taken away by the London County Court Act, (10 & 11 Vict. c. lxxi. s. 49).

The plaintiff, in an action of assumpsit against the defendant, an attorney, recovered a verdict before the sheriff, on a writ of trial, for less than 20*l*. *Held*, on motion to enter a suggestion to deprive the plaintiff of costs under the above act, that the 113th section, depriving the plaintiff of costs in such cases, applied; although the sheriff had no power to certify: the proper course for the plaintiff to have adopted being, to have inserted in the order for the writ of trial that the sheriff should have power to certify. *Jeffreys v. Beart*, 646

8. Under the 9 & 10 Vict. c. 95, s. 58, the Judge of a County Court, upon objection made that "the title to land," &c. is in question, has authority to ascertain whether it really is so or not.

Where upon a plaint for use and occupation in the County Court, the defendant objected, under the 58th section of the County Courts' Act, 9 & 10 Vict. c. 95, that the title to land, &c., came in question: *Held*, that the jurisdiction of the County Court was not ousted by the mere oath of the defendant, but that the Judge was bound to inquire into so much of the case as was necessary to satisfy him that title was really in question. It is otherwise where title is raised on the pleadings.

In any case, if the Judge is wrong, and assumes jurisdiction where the title really is in question, the defendant, upon making that appear to the superior Court, would be entitled to a prohibition. *Lilley v. Harvey*, 648

9. An application for a plaint was correctly made, and the plaint itself was correctly entered in the County Court against the defendant, as executor of "F. W. Taylor," but the summons described him as executor of "W. Thompson." At the hearing, the Judge of the County Court, upon its being represented to him that the Statute of Limitations would inter-

vene to bar the plaintiffs' claim, directed a fresh summons to issue, bearing the same date and number as the first: *Held*, on motion to this Court for a prohibition, that this Court would not interfere with the course taken by the Judge of the County Court. *Foster and Another v. Temple*, 655

10. Plaintiff in the County Court for 20*l.* for rent. Defendant appeared and pleaded pendency of another action in the Court of Exchequer upon a promissory note, the consideration for giving which was the rent: *Held*, that as they were not for the same cause of action, *eo nomine*, the jurisdiction of the County Court was not ousted.

The Judge gave judgment for the plaintiff on the 15th of February, 1848, ordering payment to be made within a week after the decision of the cause in the superior Court. The plaintiff afterwards came before him, in the absence of the defendant, and shewed that the action in the superior Court had been discontinued; whereupon the Judge granted a summons under the 98th section, calling upon the defendant to shew cause why he should not pay the amount; "the particulars of debt or claim" being, "Judgment of this Court, 15th of February, 1848, for 20*l.* debt, and 2*l.* 10*s.* 8*d.* costs. The defendant appeared, and the Judge rescinded his former order, and made an order for payment by instalments. The defendant was served with a copy of the judgment, drawn up upon this order, in the Form No. 24 in the Schedule of Forms framed by the Judges; in which it was ordered, "that the said plaintiff do recover against the said defendant the sum of 22*l.* 7*s.* 4*d.* for debt, and 1*l.* 10*s.* 2*d.* for costs:" *Held*, on motion for a prohibition, that the latter summons was not in the nature of a fresh plaint; that the Judge had jurisdiction to make the latter order, although for more than

20*l.*; and that the insertion of the word "debt" in the judgment as drawn up, did not shew an excess of jurisdiction. *Byrne v. Knipe*, 659

11. The 122nd section of the County Courts' Act (9 & 10 Vict. c. 95) contemplates those cases only, in which the ordinary relation of landlord and tenant exists.

Therefore, where the party suing under that section claimed as mortgagee of the premises, and there was no sufficient evidence that the defendant, who was tenant of the mortgagor, had consented to hold under the mortgagee, or was even aware of the existence of a mortgage; this Court granted a prohibition to the County Court, after judgment given and possession delivered.

A total want of jurisdiction cannot be cured by the assent of the parties.

The judgment of the County Court was delivered on the 27th May. On the 1st of June, affidavits in support of a rule nisi for a prohibition were sworn, and the rule obtained on the 6th. *Held*, that the defendant came within a reasonable time, although the rule was not served on the bailiff till the 7th, and he had previously delivered possession to the plaintiff on the 6th. *Jones v. Owen*, 669

12. The Judge of a County Court has no jurisdiction, under the 122nd section of the County Courts' Act, to issue a warrant to the bailiff of the Court, to give possession of premises not situated within his district; and a writ of prohibition will lie.

Quare, if the mere issuing the summons in such a case is a ground for a prohibition? *Ellis v. Peachey*, 675

13. On rule for a mandamus to the Judge of a County Court to hear a plaint brought by a member of a building society within the 6 & 7 Wm. 4, c. 32, against an officer of that society, the 25th rule of the society directing a reference of all disputes to two justices of the peace,

pursuant to the statute 10 Geo. 4, c. 56, s. 27, which is incorporated in the first mentioned statute: *Held*, that the right to bring an action was taken away; and that the 9 & 10 Vict. c. 95, s. 58, did not operate to revive a power of bringing actions in the County Courts, which had been taken away from all Courts generally.

Ex parte Payne, 679

14. The 63rd section of the 9 & 10 Vict. c. 95, provides "that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts."

Held, that the term "cause of action" was not limited to one separate cause of action, but that it meant *cause of one action*, which might include many separate contracts, and that it applied to a tradesman's bill, in which each item is connected with the former one, inasmuch as the dealing is intended to be continuous; and each item when incurred is, if not paid, united with the former ones, and forms one entire demand with them.

Quære, however, whether the 63rd section applies to all debts which can be recovered in one count, under whatever circumstances incurred?

Where the alleged cause of action arose upon certain tickets which had been given by certain persons, alleged by the plaintiff to be the agents of the defendant, to certain workmen, who, upon presenting them to the plaintiff, had been supplied by him with goods; and the plaintiff had then brought 228 plaints against the defendant in respect of such supply, in the County Court for sums amounting in all to 303*l.* 19*s.*, this Court granted a prohibition; although only one sum amounted to more than 5*l.*, and most of them were under 20*s.*

Quære, whether the Court would have granted the prohibition, if the several plaints, had not in all exceeded

the amount of 20*l.*? *Grimbley v. Aykroyd*, 701

15. An action having been brought against the defendant in the County Court, he received no notice of the proceedings, the summons having been served by a mistake at a wrong place. Judgment was given against him in his absence, proof having been given of the service of the summons to the Judge's satisfaction. The defendant made an application to the County Court under the 9 & 10 Vict. c. 95, s. 80, to set aside the judgment and execution. The Judge made an order, but upon terms to which the defendant would not consent. The defendant then paid the amount under protest, and applied to this Court for a prohibition: *Held*, that the Judge having heard the evidence of service, and decided upon it, had jurisdiction in the matter; and that, therefore, no prohibition could be granted. *Robinson v. Lenaghan*, 713

16. The privilege of an attorney plaintiff to sue in the superior Court of which he is an attorney, is not affected by the County Courts' Act, 9 & 10 Vict. c. 95.

He is, therefore, entitled to costs, notwithstanding section 129, although he recovers less than 20*l.* in an action in the superior Court. *Jones v. Brown*, 716

17. A claim to a right of fishing by the inhabitants of a town is not a question of title to an incorporeal hereditament within the proviso of sect. 58 of the 9 & 10 Vict. c. 95, (The County Courts' Act); and, therefore, the Court refused a prohibition to a County Court forbidding execution to issue on a judgment of that Court in such a case. *In re Lloyd and Jones*, 784

18. On an application to deprive a plaintiff of his costs under the 9 & 10 Vict. c. 95, s. 129, it is necessary that the affidavit on the part of the defendant should shew not merely that the cause of action arose within

COURT ROLLS.

the jurisdiction of the County Court, but that the defendant was resident within the jurisdiction at the time when the action was brought. *Matthew v. Broughall*, 791

19. In order to entitle a defendant to deprive a plaintiff of his costs under the 9 & 10 Vict. c. 95, s. 129, it is requisite that the affidavit in support of the application should negative that the cause comes within any of the exceptions contained in section 128. *Meetan v. Nicholls*, 799

COURT OF REQUESTS.

The Isle of Wight Court of Requests' Act (46 Geo. 3, c. lxvi. s. 40) enacts that "if any action" "for any debt recoverable by virtue of this act in the said Court of Requests, shall be commenced in any other Court, the plaintiff" "in such action," &c., "shall not, by reason of a verdict for him," &c., "or otherwise, have or be entitled to any costs whatsoever." A writ of summons was sued out in this Court on the 1st December, 1846, for a debt recoverable in the Court of Requests, but was not served till the 28th of March, and judgment by default signed on the 20th of April following. On the 22nd of March, a County Court was substituted for the Court of Requests, under the 9 & 10 Vict. c. 95: *Held*, on motion to enter a suggestion to deprive the plaintiffs of costs, under the Court of Requests' Act, that that act was not repealed by the 9 & 10 Vict. c. 95, s. 5, so far as related to the depriving the plaintiffs of costs.

Held also, that the motion was not too late, although judgment by default had been signed in an action of debt, and execution issued. *Warburg and Others v. Read*, 71

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On application for a mandamus to inspect the Court Rolls of a manor, to a copyhold in which the applicant

DECLARATION. 825

claims to be entitled, the affidavit in support of the rule should either state positively that the applicant is the party entitled thereto, or should set out the title on which he rests his claim, so that the Court may judge of its reasonableness. *Ex parte Cooke*, 413

CROSS ACTION.

See PLEA, 16.

CROWN.

See PLEA, 2.
PRISONER.

DATE.

See PLEA, 17.

DECLARATION.

1. A declaration stated that the defendants made their promissory note, and thereby promised to pay H. (since deceased), or order, 300*l.*; that H. indorsed the note without making any delivery thereof; and that after his death his executrix transferred the note to the plaintiffs, to wit, by delivery thereof to them: *Held*, on general demurrer, that the plaintiffs had no title to sue on the note. *Bromage and Another v. Lloyd and Another*, 123

2. A declaration in assumpsit alleged that the plaintiff had agreed, with divers other persons, to endeavour to establish a company for making a railway, the capital of which was to be divided into shares, upon which a deposit of 2*l.* 2*s.* for each share was to be paid by the allottees; that the plaintiffs were the committee of management of the company, and that they, at the request of the defendant, allotted to him certain shares, upon certain terms then agreed upon by and between the plaintiffs and the defendant, to wit, that a deposit upon each of such shares should be paid

by him to the account of the company, to one of certain bankers then appointed in that behalf, of all which premises the defendant had notice; and thereupon in consideration of the premises, and that the plaintiffs, at the request of the defendant, then promised the defendant to perform the said terms on their part; the defendant then promised the plaintiffs to perform the said terms on his part. That the plaintiffs were always ready and willing to perform the said terms on their part. Yet the defendant hath not paid to any of the said bankers the said deposit, or any part thereof.

Held, that the declaration was not bad, for omitting to shew that the provisions of the 7 & 8 Vict. c. 110, with reference to joint stock companies, had been complied with, or that the company had been formed before the passing of that act.

Held also, that the declaration disclosed a sufficient contract between the plaintiffs and the defendant, upon which the plaintiffs might sue without joining all the company; and that there was a sufficient consideration moving from the plaintiffs to the defendant to support such a promise.

Held also, that the declaration set out the terms to be performed by the plaintiffs with sufficient certainty.

Held also, that it was not necessary to state that the company was continuing at the time of the allotment made, or to allege specifically that the defendant had accepted the allotment. *Sir James Duke, Knt., and Others v. Forbes*, 198

3. The declaration in an action on the case alleged, that the plaintiff being indebted to L. in 36*l.*, he, by the defendant as his attorney, sued the plaintiff; and that after declaration, the plaintiff petitioned the Court of Bankruptcy, under 7 & 8 Vict. c. 96, and obtained a protection from process, of which the defendant had notice. Yet the defendant, well

knowing the premises, but wilfully and maliciously intending, &c., procured judgment to be signed against the plaintiff, and sued out a ca. sa., under which the sheriff arrested the plaintiff: *Held*, that the declaration was not sufficient, and that it ought to have alleged that the arrest was without reasonable or probable cause. *Roret v. Lewis*, 371

4. The declaration alleged that the defendants were a joint stock company, having obtained a certificate of complete registration; that P. and L. then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the company, to pay the plaintiff or order 32*l.* 4*s.* 9*d.*, the balance of account due to him from the company three months after date, which note was signed by the said P. and L., and made by them and in their names, and on behalf of the said company, and countersigned by the secretary of the company; and thereupon the defendants, in consideration of the premises, promised the plaintiff to pay him the said note: *Held*, that the declaration was insufficient, and did not shew any authority in P. and L. to bind the company. *Thompson v. Universal Salvage Company*, 380

DE INJURIA.

See PLEA, 4.

De injuriâ is a good replication to a plea under the Tippling Act, 24 Geo. 2, c. 40, s. 12. *Lansdale v. Clarke and Another*, 95

DEMURRAGE.

See VARIANCE, 2.

DEMURRER (FRIVOLOUS).

The Court refused to set aside as frivolous a demurrer to a declaration, on the ground that the defendant was described by the initial of his Christian name. *Nash v. Collier*, 341

EJECTMENT.

DEPONENT.

See AFFIDAVIT, 1.

DISTRESS.

See SEVERAL COUNTS, 4.

DISTRINGAS.

The defendant was a lunatic, and was confined in a lunatic asylum; and the party going there to serve him with a writ of summons was told, on several occasions, by the proprietor of the asylum, and by his wife and daughter, that it was against the rules of the establishment that the lunatic could be seen. The proper number of calls were made; and, on the last occasion, a copy of the writ left with the daughter of the proprietor. The Court granted a distringas to compel an appearance, directing the writ to be served on the wife of the lunatic, or at his last place of residence, as well as at the asylum. *Mutter and Another v. Foulkes*, 557

DUPLICITY.

See PLEA, 4, 9, 18.

REPLICATION, 2, 4.

EJECTMENT.

See CONSENT RULE.

1. A declaration in ejectment contained two demises in two counts, in each, one "pasture gate," and one "cattle gate," were sought to be recovered. The cause having been referred, the arbitrator awarded that the lessor of the plaintiff was entitled to recover "three certain pasture gates." The lessor of the plaintiff entered up the verdict for "three certain pasture gates, sometimes known as pasture gates, sometimes as cattle gates." *Held*, that it was not competent to the lessor of the plaintiff to make such an alteration; although it was sworn, on the part of the lessor, that the names "pasture gate," and "cattle gate," were indiscri-

ERROR.

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minately used for the same thing. *Doe d. Hazby v. Preston and Another*, 7

2. In an ejectment under the 4 Geo. 2, c. 28, where the premises are kept locked, and access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not; the affidavit stating those facts is sufficiently positive, if it state a *belief* only, that there is no sufficient distress on the premises. *Doe dem. Cox v. Roe*, 272

3. To a rule calling on the tenant in possession to shew cause why service of a declaration and notice in ejectment on his daughter, on the premises, should not be deemed good service, it is no answer that the notice was not read over or explained to the party served, and that the service took place at ten o'clock of the night preceding the first day of Term; unless it is sworn that the tenant was not acquainted with the nature and meaning of the proceedings before the first day of Term. *Doe dem. Kenrick and Others v. Roe*, 578

ENLARGED RULE.

See RULE ENLARGED.

ENTRY OF ORDER.

See INSOLVENT, 2.

ERROR.

See EXECUTION.

HABEAS CORPUS.

OUTLAWRY.

1. On writ of error on a judgment in an inferior Court, where the execution has been levied before the allowance of the writ, but not paid over till after, this Court has no power to order the sum levied to be paid into Court, to abide the result of the writ of error. *Spencer and Another v. Haggiadur*, 66

2. A writ of error was directed to M. T. B. Esq., "Recorder of the Court of record of and for the borough

of K." The return was made by M. T. B., Esq., "*Judge of the Court of record of the borough of K.*" It appeared that the Court of record of the borough of K. was an ancient Court of record, and that the Recorder acted as Judge, under the 5 & 6 Wm. 4, c. 76, s. 118. On motion to quash the writ of error for irregularity, the Court allowed the plaintiffs to amend the writ of error by inserting the word "Judge" instead of "Recorder." *Spencer and Another v. Haggiadur*, 68

3. Where the declaration contained two counts, one of which was bad; and the verdict in the Court below was taken generally for the plaintiffs: *Held*, that this Court had no power, after error brought, to amend the verdict, by confining it to the sufficient count. *Ibid*

4. An affidavit, in support of a motion under the 9 & 10 Vict. c. 68, s. 5, to quash a writ of error for wilful delay, stated, that since the issuing and filing of the writ of error, "no process, or other proceeding, has been had, or taken, by or on behalf of the said defendants, to prosecute the same:" *Held* sufficient, without stating that the defendants had not assigned errors, or that the defendants had been ruled to assign errors." *Regina v. Henry Broome and John Broome*, 607

5. It is not necessary, in order to proceed under the 8 & 9 Vict. c. 68, s. 5, to quash a writ of error for delay, that the defendants should have been previously ruled to assign errors. *Ibid*

EXECUTION.

See DECLARATION, 3.
SCIRE FACIAS, 4.

The Court refused to permit execution to issue notwithstanding a writ of error, the notice of allowance stating the ground of error to be that the defendant had set forth the award of a ca. sa. for costs of a nonsuit, since

GUARDIAN AND WARD.

the 7 & 8 Vict. c. 96, s. 57, which prohibits a person from being taken in execution where the sum recovered does not exceed 20*l.* *Newton v. Lord Conyngham*, 762

EXECUTION, (CHARGING IN).

See CHARGING IN EXECUTION.

EXECUTOR.

See AMENDMENT, 3.
DECLARATION, 1.
REPLICATION, 3.
SCIRE FACIAS, 1.

EXTENT.

See PRISONER.

FISHERY.

See COUNTY COURT, 17.

FOREST.

See PLEA, 2.

FRAUDULENT PREFERENCE.

See WARRANT OF ATTORNEY, 3.

FRIVOLOUS DEMURRER.

See DEMURRER (FRIVOLOUS).

GENERAL ISSUE.

See PLEA, 3, 6.

GROWING CROPS.

See PLEA, 4.

GUARDIAN AND WARD.

A. was left a widow in India with two children. B., the mother of her deceased husband, offered to take charge of the children if they were sent home to her to England. One of them accordingly was sent home to the grandmother, and resided with her till the time of her death in 1843. She left her property to trustees in trust for the children. Since her

death, the child had been put to school by the trustees, and was under their charge and control; with whose arrangements the mother had at various times expressed her satisfaction, and her sense of the kindness shewn to the child. In the early part of 1847, the mother, who had married again, and her second husband, executed a joint and several letter of attorney to C. to demand and receive the custody of the child on her behalf. C., after demand and refusal, brought a writ of habeas corpus. The Court refused, under the above circumstances, after the acquiescence by the mother in the custody of the trustees, and no cause of complaint being assigned for the change, to remove the child from their custody; or to examine the child with a view of ascertaining whether he were capable of exercising a sound discretion, and if so, of declaring him at liberty to go with whomsoever he wished.

Quære, whether a parent residing abroad can appoint an attorney to claim and receive, under a writ of habeas corpus, the custody of an infant child?

And *quære*, if a widow, having married again, can execute such a letter of attorney? *In re Preston*, 233

HABEAS CORPUS.

See CHARGING IN EXECUTION.

The Court refused to grant a habeas corpus in order to discharge a defendant who was detained in custody on a warrant of a Judge belonging to a Court of competent jurisdiction, which set out an adjudication, on which, if erroneous, a writ of error might be brought. *Ex parte Dunn*, 345

HIGHWAY.

The appointment of a surveyor of the highways by justices at a special sessions, upon neglect or refusal on the part of the parish to nominate and elect a surveyor, under the 5 & 6

QVL. v.

Wm. 4, c. 50, s. 11, is invalid, if made at the same sessions at which the neglect or refusal appears.

The 5 & 6 Wm. 4, c. 50, s. 6, which enacts that the inhabitants of a parish maintaining its own highways, shall proceed to the election of surveyors of the highways "at their first meeting in vestry for the nomination of overseers of the poor in every year," requires the vestry to be one of which due notice has been given in pursuance of the 58 Geo. 3, c. 69, s. 1.

Where it appears that two rates for the repair of the highways are co-existent, the Court will not presume that they are made for the same period of time, and, therefore, invalid. *Regina v. Best and Others, Esquires, Justices of Surrey*, 40

HIGHWAY ACT.

The words in the General Highway Act, 5 & 6 Wm. 4, c. 50, s. 85, "quarter sessions" "holden for the limit within which the said highway" "shall lie;" mean the quarter sessions held for the "county, riding, division, shire," &c., in which the highway is situate; and not a mere adjournment thereof, held within a particular division.

Therefore, where the quarter sessions for the county were held within one division, and afterwards by adjournment within three other divisions, and on an appeal under the 88th section of the General Highway Act, the notice of appeal was given ten clear days only before the adjourned sessions at which the appeal was to be tried, and within which the highway was situate, and not ten clear days before the first holding of the sessions; and the sessions declined to hear the appeal, on the ground that the notice had not been given in time; this Court refused to grant a mandamus compelling them to enter continuances and hear the appeal. *Regina v. The Justices of Suffolk*, 558

H H H

D. & L.

INCORPOREAL HEREDITAMENTS.

See COUNTY COURT, 17.
PLEA, 2.
REPLICATION, 1.

INDIA.

See AFFIDAVIT, 2.

INFANT.

See GUARDIAN AND WARD.
PLEA, 9.

INSPECTION OF DOCUMENTS.

In an action by the allottee of railway shares against a managing director for the recovery of his deposit, the Court made absolute a rule for the plaintiff or his attorney to have liberty to inspect and take copies of the subscribers' agreement and parliamentary contract; upon an affidavit stating that the agreement and the contract had been signed by both the plaintiff and the defendant, and that they were in the hands of the defendant or his attorneys, and that the plaintiff could not safely frame his case or go to trial without such inspection and copies; notwithstanding that the defendant's attorneys claimed a lien on such deeds for their charges against the company. *Ley v. Barlow*, 375

INSOLVENT.

See ABATEMENT, 1.
PLEA, 7.
SECURITY FOR COSTS, 1.

1. Under the 1 & 2 Vict. c. 110, s. 55, a vesting order is "an order appointing an assignee" of the prisoner, in pursuance of the act, within the meaning of that section.

The provisional assignee of an insolvent prisoner, in whom the estate and effects of such prisoner are vested by an order of the Insolvent Debtors' Court, under the 1 & 2 Vict. c. 110, s. 37, may therefore apply for

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and obtain a sequestration of the profits of the prisoner's benefice, under section 55 of that statute. *Smith v. Wetherell, Clerk*, 278

2. Where upon the hearing of an insolvent prisoner's petition, who had obtained an interim order for protection from arrest, under 7 & 8 Vict. c. 96, the commissioner under section 24, refused a day for his final order, on the ground of fraud, in contracting a debt; but did not remand him to his former custody, as authorized by that section: *Held*, that, the time limited for his protection by the interim order having expired, the plaintiff, one of his detaining creditors, might, under the 6th section, issue a fresh writ of ca. sa., and arrest him under it. And that no scire facias was necessary to revive the judgment.

Quære, if such writ should recite the circumstances under which it issues.

If it does not, it is an irregularity merely, and may be waived by lapse of time.

Where the defendant was arrested on the 28th of August, and the application was made to set aside the writ on the 6th of November, without explanation of the delay upon the defendant's affidavits; and it appeared upon the affidavits in opposition to the rule that two similar applications had already been made by him to a Judge at Chambers, and refused; *Held* too late. *Parker v. Bayley*, 296

INTRUSION.

See PLEA, 2.

ISSUES SEVERAL.

See COSTS.

COSTS IN THE CAUSE.

JOINT STOCK COMPANY.

See DECLARATION, 2, 4.

The senior Master of the Common Pleas having declined to register a

JUDGMENT, &c.

memorandum to charge real estate, (belonging to a past member of a joint stock banking company, against the public officer of which, a verdict had been obtained), pursuant to 1 & 2 Vict. c. 110, s. 19, and the 3 & 4 Vict. c. 82, s. 2; the Court refused to compel him to receive the memorandum. *Ex parte Ness*, 339

JUDGE (JURISDICTION OF).

See MORTGAGOR AND MORTGAGEE.

JUDGMENT.

See ALLOCATUR.

JUDGMENT (AS IN CASE OF A NONSUIT).

1. Where a rule for judgment as in case of a nonsuit has been discharged upon the plaintiff's giving a peremptory undertaking, and the plaintiff never draws up the rule, or fulfils his undertaking, it is not necessary in this Court, in order to entitle the defendant to judgment absolute as in case of a nonsuit, that he should draw up and serve the rule within the time limited by the peremptory undertaking. *Landells v. Ball*, 62

2. On a motion for judgment as in case of a nonsuit, the affidavit stated "that no notice of trial had been given in this cause," without negating that a trial had in point of fact been had: *Held* sufficient. *Woolmer v. Collins*, 306

3. Where in an action against four persons, issue was joined as to two, but the third died after declaration, and before plea, and the fourth died after plea and before issue joined; the Court held, that judgment as in case of a nonsuit could not be obtained by the survivor, without entering a suggestion on the record of the death of the deceased defendants. *Pinkus v. Sturch and Others*, 515

4. Where a peremptory undertaking to proceed to trial at a particular sit-

LANDS' CLAUSES, &c. 831

tings is given, and the cause is duly entered for those sittings, but it is made a remanet by the Court, that is not a breach of the plaintiff's undertaking, and, therefore, the defendant is not entitled to judgment as in case of a nonsuit. *Rizzi v. Folletti*, 808

JURAT.

See ABATEMENT, 3.
AFFIDAVIT, 2.

JURISDICTION.

See COUNTY COURT, 11, 15.

JURISDICTION OF JUDGE.

See JUDGE (JURISDICTION OF).

LACHES.

See INSOLVENT, 2.

LAND.

See COUNTY COURT, 8.

LANDS' CLAUSES CONSOLIDATION ACT.

See WAIVER, 1.

1. On a submission to arbitration under the Lands' Clauses Consolidation Act, 8 & 9 Vict. c. 18, the 34th section imposes on an umpire the duty of ascertaining whether the right of the claimant to costs under that section arises; and if it does, of settling their amount in his award; and he cannot, by a subsequent certificate, entitle the claimant to obtain payment of them. *In re the Arbitration between The London and North Western Railway Company and James B. Quick*, 685

2. Where costs are settled by one of the Masters of the Court of Queen's Bench, under the 52nd section of the 8 & 9 Vict. c. 18, (Lands' Clauses Consolidation Act) the Court has no power to order a review of the taxation; the costs being referred to the

Master, by that section as an original arbitrator.

Quære, whether the words "the sum previously offered" in the 51st section, refer to the sum which the company "are willing to give," and which, by the 38th section, they are bound to state, in the notice of their intention to cause a jury to be summoned? *Ross v. York, Newcastle, and Berwick Railway Company*, 695

LANDLORD AND TENANT.

See COUNTY COURT, 11.

LIMITATIONS (STATUTE OF).

See AMENDMENT, 2, 3.

PLEA, 19.

LUNATIC.

See DISTRINGAS.

1. An appeal against an order for payment of maintenance and expenses of a lunatic pauper under 8 & 9 Vict. c. 126, s. 62, which recites an order adjudicating the settlement of the pauper, is an appeal also against the settlement.

The 8 & 9 Vict. c. 126, s. 62, incorporates so much of the 4 & 5 Wm. 4, c. 76, s. 79, as is applicable to the case of an appeal against an order adjudicating the settlement of a lunatic pauper. A copy of the examinations must therefore be sent to the parish on whom an order for maintenance, &c., of a lunatic pauper, reciting an adjudication of the settlement, is made.

Semble, that in the case of a lunatic pauper, a notice of chargeability under 4 & 5 Wm. 4, c. 76, s. 79, need not be sent. *Regina v. Justices of Middlesex, (Holy Trinity, London v. St. James, Clerkenwell)*, 9

2. No notice of an application for an order, adjudicating the settlement of a lunatic pauper, under the 8 & 9 Vict. c. 126, s. 58, need be given to the parish, on whom it is made.

On appeal against an order for payment of expenses and maintenance

MARRIED WOMAN, &c.

under sect. 62, the settlement of the pauper lunatic may be contested. *Ex parte The Churchwardens and Overseers of the Poor of the Parish of Monkleigh*, 404

MANDAMUS.

See COURT ROLLS.

1. Where a party unsuccessfully opposes a rule for a mandamus to set right the sessions, who have wrongly decided a matter in his favour, he will in general be made to pay the costs of the mandamus; unless, perhaps, the matter is wrongly decided by the Court itself, uninfluenced by any improper objection on his part.

On an application for a rule for the payment of such costs, it is not necessary that a demand of the costs from the opposite party should have been previously made. *Regina v. Justices of Cheshire, (Kermincham v. Lower Withington)*, 426

2. A party, who succeeds at the sessions upon an objection which turns out to be ill founded, and resists an application for a mandamus to correct the error, by shewing cause against it, is within the general rule for the payment of the costs by the unsuccessful party; subject to exceptions which the Court may make in particular cases in the exercise of their general jurisdiction over the costs. *Regina v. The Justices of Cumberland, Regina v. The Justices of Lancashire*, 430

MARRIED WOMAN (ACKNOWLEDGMENT OF).

See AFFIDAVIT, 2.

1. The Court permitted an acknowledgment of a married woman, made in India, under the 3 & 4 Wm. 4, c. 74, to be received, on producing a verified certificate of a *superior military officer*, that the person, before whom the affidavit of acknowledgment was made, was a justice of the peace; there being no *notary* at the place of

MORTGAGOR, &c.

acknowledgment. *In the matter of Mary Jane Daley*, 333

2. The Court permitted an affidavit of verification of an acknowledgment by a married woman to bar her dower before commissioners, to be received by the officer of the Court; although written on paper instead of parchment. *Ex parte Carr*, 488

3. Although a British consul in a foreign country has not power *per se* to administer oaths of verification of the proceedings before a commissioner under the 3 & 4 Wm. 4, c. 74, s. 83; yet if a notary public in the foreign country certify that by the laws of that country the British consul has power to administer an oath, an affidavit of verification made before the consul will be received. *Ex parte Hutchinson*, 523

MISNOMER.

A writ described a defendant as "the Right Honorable Baron Suffield," his true description being "the Right Honorable Edward Vernon Harbord, Baron Suffield; the Court refused to set aside the process on that ground.

A præcipe being obtained for an alias writ, a pluries was by mistake issued: *Held*, to be no ground for setting aside the pluries. *Wells v. Lord Suffield*, 177

MONTH.

See PLEA, 1.

MORTGAGOR AND MORTGAGEE.

See COUNTY COURT, 11.

Under the 7 Geo. 2, c. 20, which provides that "where any action shall be brought on *any bond* for payment of the money secured by such mortgage," &c., the Court may, on payment of the principal monies, interest and costs, &c., compel the mortgagee to reconvey and deliver up deeds,

NOTICE OF TRIAL. 833

&c.; *Held*, that where an action was brought on the covenant for payment in the *mortgage deed*, the case was within the act, and an order might be made for the delivery up of deeds, &c.; *Held* also, that the order might be made by a Judge at Chambers. *Smeeton and Another, Executors, v. Collier*, 184

MOTHER.

See GUARDIAN AND WARD.

MUTUAL RELEASES.

See ARBITRATION, 2.

NON ASSUMPSIT.

See PLEA, 20.

NON-JOINDER.

See ABATEMENT, 1.

NON OBSTANTE VEREDICTO.

See ARBITRATION, 1, 2.

NON PROS.

The defendant had obtained an order for particulars of plaintiff's demand before declaration, with a stay of proceedings until delivery. After two Terms had elapsed without such delivery, he obtained an order to rescind his former order, and served it, with a demand of declaration within four days. No declaration having been delivered within the four days, he signed judgment of non pros.: *Held*, that the judgment was regular. *Johns v. Saunders*, 49

NOTICE OF TRIAL.

The form of a notice of trial is immaterial, if it be delivered in time, and clearly and unquestionably informs the defendant that the plaintiff intends to proceed to trial at a certain specified time.

Therefore, a notice of trial purporting to be a continuance only of a

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former notice, but delivered in sufficient time to be of avail, if it had been an original notice, was held to be good as an original notice.

It is no objection to a notice of trial that it is given after the cause has been set down for trial. *Ginger v. Pycroft*, 554

NOTARY.

See **MARRIED WOMAN, (ACKNOWLEDGEMENT OF).**

NOT GUILTY.

See **PLEA, 14.**

NULLITY.

See **COUNTY COURT, 1.**

1. A Judge at Chambers having made an order to set aside a verdict for the plaintiff on a writ of trial, on the ground of an insufficient notice of trial: *Held*, that the Judge's order was an irregularity only, and not a nullity; and, therefore, might be waived. *Orgill v. Bell*, 217

2. Where an incorrect copy of a writ of summons was served as if tested on a Sunday, but the writ itself was regular: *Held*, that the defendant was not bound to treat the proceeding as a mere nullity, although the plaintiff had taken no subsequent steps; but might come to the Court to set the copy and service aside. *Corrall v. Foulkes*, 590

NUL TIEL RECORD.

1. It is necessary, in order to try the issue joined on a plea of nul tiel record, that the issue roll should be made up and carried in, notwithstanding the Reg. Gen., H. T., 4 Wm. 4, pt. II. r. 15. *Jackson v. Oates*, 231

2. In a declaration on a replevin bond, it was alleged that A. H. (the plaintiff in replevin) levied his plaint in the County Court against the present plaintiff, and that it was adjudged

PARTICULARS.

that A. H. should take nothing by his plaint. The defendant pleaded nul tiel record. Issue was joined on this plea, and the plaintiff produced an entry from the County Court book, in which the entry was as to the plaint "struck out for want of jurisdiction, on the ground of a disputed title having been sworn to:" *Held*, that this entry did not support the averment in the declaration. *Tubby v. Stanhope*, 781

OFFICE.

See **QUO WARRANTO.**

OUTLAWRY.

It is not necessary, in proceeding by writ of error to reverse a judgment of outlawry on mesne process, that there should be an affidavit that the attorney, suing out the writ, is duly authorized by the outlaw.

Nor is it necessary that an appearance by the outlaw should be entered previous to suing out the writ. *Cornwall v. Ives*, 399

OYER.

The rule that where oyer is demanded, the defendant has the same time to plead after it is granted, as he had at the time of the demand, applies in respect of pleas in abatement as well as of pleas in bar. *Kerfoot, Executor, v. Edwards*, 748

PASTURE GATE.

See **EJECTMENT, 1.**

PAYMENT.

See **BILL OF EXCHANGE.**

PARLIAMENT (PRIVILEGE OF).

See **PRIVILEGE OF PARLIAMENT.**

PARTICULARS.

See **NON PROS.**

A declaration in debt contained

counts for money lent, money had and received, and money due on an account stated, in each of which the defendant was alleged to be indebted to the plaintiff in 6*l.* 10*s.* The defendant pleaded a set-off of 50*l.* The particulars of demand claimed 6*l.* 10*s.* for money lent. At the trial, the defendant proved a set-off for 6*l.* 10*s.* The undersheriff thereupon directed the jury to return a verdict for the defendant: *Held*, that this was a misdirection on the part of the undersheriff, and a rule for a new trial which had been obtained, was made absolute. *Roche v. Champaign*, 121

PAUPER.

See *APPEAL*, 1, 2.

LUNATIC, 1, 2.

A plaintiff suing in formâ pauperis may execute a release of the cause of action to the defendant, without the consent or knowledge of his attorney; if it be done bonâ fide with a view to settle the action, and not from any intention to deprive the attorney of his costs.

The Court refused to set aside a plea of release puis darrein continuance in a pauper cause, on the ground that the release had been given without the knowledge or consent of the plaintiff's attorney; where it appeared to have been executed in pursuance of a bonâ fide arrangement between the plaintiff and the defendant to settle the action, and without any collusion on their part to deprive the attorney of his costs. *Jones v. Bonner and Nash*,

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PETTY SESSIONS.

See *CERTIORARI*, 1.

PLEA.

See *ABATEMENT*, 2.

AUDITA QUERELA, 2.

BANKRUPT.

1. To an action on an attorney's bill, the defendant pleaded that the

plaintiff did not deliver "one month" before bringing the action a signed bill of his fees, "pursuant to the statute in such case made," "contrary to the form of the said statute." The 6 & 7 Vict. c. 73, s. 37, requires a bill to be delivered "one month" before bringing an action, and by the interpretation clause, "month" is declared to mean "calendar month." *Held*, on special demurrer, that the word "month" in the plea was to be taken to mean "lunar month;" that the words "pursuant to the statute," &c. would not enable the Court to construe it as a "calendar" month; and that as the act required a delivery a "calendar month" before the action, the plea was bad as tendering an inconclusive and immaterial issue.

Quære, if the plea was not also bad as being an argumentative averment that the plaintiff did not deliver one "calendar" month before bringing the action, a signed bill, &c. *Parker v. Gill*, 21

2. An information by the Attorney General stated that the Queen was seised in fee of a certain forest, &c., and that she and all her ancestors, kings, &c., continually held and enjoyed the said forest, and the game of wild beasts and fowls of forest, chase, and warren, coming and arising from the said forest, and all rights, &c., without any disturbance, title, or claim, &c.: that the defendant, without any lawful warrant, right, or title, erected a fence, and dug a ditch in and upon the soil of the said forest, to wit, in and around one hundred acres of land, being parcel of and within the said forest, and encroached and usurped thereon, and separated the same from the residue of the said forest; whereby the Queen could not have and enjoy the said forest, or the said game, and the said rights, &c., in as full and ample a manner as she ought; to the great injury and disturbance of the Queen in the said forest, and to the great damage and

destruction of the vert and venison of and in the said forest, &c. Plea, "that the place in which, &c., was not, nor was any part thereof, parcel of or within the supposed forest, modo et formâ."

Held, on demurrer to the plea, that the cause of action was ambiguously stated, and that the information must be considered in the nature of an action of trespass on the case for injury to the incorporeal right of forest, by interfering with the game; and that therefore, the plea was good, the defendant not being bound to make title to the land.

Held also, that such a plea would be bad, if pleaded to an information of intrusion into lands of the crown. *The Attorney General v. Hallett*, 87

3: Assumpsit for the use and occupation of furnished apartments. Plea, that before the defendant held the said apartments by the permission of the plaintiff, he held the same as tenant under a demise from A. B.; that while he so held them, A. B. assigned all her interest therein to the plaintiff; that the occupation in the declaration mentioned was a continuation of the tenancy under A. B., and that the defendant paid A. B. the money in the declaration mentioned without notice of the assignment, and that defendant never expressly promised to pay the plaintiff the money in the declaration mentioned: *Held* bad, as amounting to the general issue. *Cook v. Moylan*, 101

4. Covenant for payment of 250*l.* and interest on demand. Plea, that the covenant was entered into in pursuance of an usurious contract, by which the defendant agreed to pay more than 5*l.* per cent. by way of interest, and that the payment was secured by a deed whereby the defendant bargained and sold to the plaintiff, by way of security, certain personal chattels, and also *the crops of grass then growing on certain lands*. Replication, that the contract was

entered into after the passing of the 2 & 3 Vict. c. 37.

Held, that the plea was good, and the replication bad; for though the terms "growing crops" might mean crops to be sowed by the owner of the soil, and delivered as a personal chattel; yet the plea *primâ facie* shewed an usurious contract within the 12 Anne, stat. 2, c. 16; and if the plaintiff relied upon the 2 & 3 Vict. c. 37, he should have replied that the contract was entered into after the passing of that act, and that the security did not relate to land.

The defendant also pleaded fraud, to which the plaintiff replied *de injuriâ*. *Held*, a good replication.

Another plea stated that the defendant mortgaged to the plaintiff certain goods and chattels, and that the plaintiff sold the same, and received the proceeds of the sale, and thereby satisfied himself in the sum of 250*l.* and interest, and that he accepted the proceeds in full satisfaction of 250*l.* and interest. Replication, that the plaintiff did not sell the said goods and chattels, nor receive the proceeds of such sale, nor pay himself the sum of 250*l.* and interest, nor accept the said proceeds in satisfaction, &c.: *Held*, that the replication was not double. *Washbourn v. Burrows*, 105

5. To an action by indorsee against maker of a promissory note, the defendant pleaded that the note was made by himself and E., his partner; and that whilst the plaintiff was the holder of the note, the defendant and E. delivered to him nineteen signed bills of costs, which were referred to taxation: that it was agreed that the balance found due from the plaintiff to the defendant and E., on such taxation, should be applied in part payment of the note, and that the balance of the note, with interest, should be secured by a judgment, payable at certain periods, which had elapsed before the commencement of

the suit: that the taxation was still pending, and the balance not ascertained: and that the defendant and E. had always been ready and willing to apply the balance due to the defendant towards the payment of the note, and on completion of the taxation, to secure the balance due on the note by a judgment in accordance with the agreement: *Held* bad on demurrer, as even supposing it to be a good agreement to suspend the remedy, the lapse of time shewed the performance of it to be impossible. *Carter v. Wormald*, 181

6. In a declaration in assumpsit by vendee against vendor for the non delivery of an abstract of title, one of the conditions of sale set out was, "that the vendor would deliver an abstract of title to the purchaser."

Plea, that it was part of the contract that the defendant should deliver an abstract commencing with a certain conveyance, dated 1843 only, and not be required to shew any previous title, and that he did furnish such an abstract: *Held*, on special demurrer, to be bad, as amounting to the general issue. *Sharland v. Leifchild*, 139

7. A plea of the defendant's discharge under the 5 & 6 Vict. c. 116, should either set out the proceedings in conformity with section 4, or describe them as in section 10 of that statute. *Wright v. Hutchinson*, 149

8. A declaration in debt contained two counts, each demanding the sum of 26*l.* Plea as to 5*l.* parcel, &c., a tender of 5*l.* before action brought. Replication, that at the time of the tender, the sum of 13*l.* 15*s.* was due from the defendants to the plaintiff as one entire sum, and on one entire contract not divisible from the sum of 5*l.*; that afterwards the plaintiff demanded the sum of 13*l.* 15*s.*, but the defendants refused to pay the same: *Held*, on demurrer, that the replication was good; as a tender of a part of an entire debt is bad in law; and if the defendants relied on a set-

off, &c., it should have been rejoined. *Dixon the Younger v. Clark and Another*, 155

9. To a declaration on a bill of exchange against the defendant as acceptor, he pleaded that he accepted the bill while he was an infant, it being without date at the time of the acceptance; that the plaintiff afterwards altered the bill by writing a date thereon; and that there never was any license or ratification by the defendant to such alteration, after he attained the age of twenty-one years: *Held*, on special demurrer, that the plea was not bad for duplicity. *Harrison v. Colgreave*, 169

10. Action for use and occupation. Plea, that plaintiff wrongfully seized and detained certain goods of defendant of sufficient value to pay the rent and costs; that it was agreed that plaintiff should retain them in satisfaction of the rent, and that he did retain them. Replication, traversing the seizure of sufficient value, &c. Replication held bad, as traversing mere inducement to the allegation of acceptance in satisfaction. Plea held good as disclosing a good accord and satisfaction. *Jones v. Sawkins*, 353

11. Where a plea in abatement was supported by an affidavit of verification, which disclosed the place of business, but not the place of residence, of an alleged co-contractor with the defendant; the Court set it aside, on the ground that it did not comply with the provisions of the 3 & 4 Wm. 4, c. 42, s. 8.

Whether the affidavit does, or does not, state the true place of residence, is a matter which may be controverted and determined by the Court on motion. *Maybury v. Mudie*, 360

12. The declaration stated an agreement by plaintiff to act as defendants' salesman for one year; to devote the whole of his time to them, and not to be connected with any other house in disposing of goods; for which defendants were to pay plaintiff 200*l.* for

the year. It then averred that plaintiff did enter into defendants' service for part of the year, and was always during the year ready and willing to remain in such employ, and not to be connected with any other house. Breach: that defendants would not suffer plaintiff to act as their salesman for the remainder of the said year, or pay him the 200*l*.

Plea, as to the not paying the 200*l*, that, during the year, the plaintiff entered the service of another house, and became connected with such house, in the disposal of their goods. Verification.

Held, bad, upon special demurrer, as traversing argumentatively the plaintiff's readiness and willingness to remain in the employment of the defendants. *Spotswood v. Barrow and Another*, 373

13. Debt on a bond given by a surety under the 1 & 2 Vict. c. 110, s. 8. Plea, that after making the bond, the plaintiff brought an action against the principal, and took and detained him in execution, according to the practice of the Court of Queen's Bench, in respect of the said debt; that, from the time of recovering such judgment until the arrest, he, the principal, was always ready and willing to render himself, according to the course and practice of the Court of Queen's Bench; and that by reason of his detention in execution, he was, by the practice of the said Court, exonerated and discharged from rendering himself according to the said condition: *Held*, on special demurrer, that the plea was bad, as it did not distinctly allege either that the principal did surrender according to the condition of the bond, or that such surrender was made impossible by the act of the plaintiff. *Hayward v. Bennett*, 480

14. Case for so negligently keeping a mischievous dog, knowing his mischievous propensities, that he worried the plaintiff's sheep. Plea, not guilty:

Held, that this plea put in issue the scienter. *Card v. Case*, 509

15. A declaration in covenant alleged the covenant to be by a company, to pay a certain sum to the plaintiff, as soon as conveniently could be done, out of the money raised by the first calls upon the shareholders of the company. Breach, that the money was not paid as soon as conveniently could have been done out of the first calls: *Held* a good breach, the objection being taken to the declaration after pleading over. The company, who were the defendants, pleaded thirdly, that the deed of settlement, but which was not the deed declared on, was obtained by fraud. Fourthly, that the registration and incorporation of the company recited in the deed were obtained by fraud. Eighthly, that sufficient money had not been raised to pay the plaintiff, after providing for the expenses of the company, according to the terms of the deed of settlement. Twenty-firstly, that the company was not incorporated by any charter or act of Parliament, nor duly registered according to the 7 & 8 Vict. c. 110. Twenty-secondly, that at the time of obtaining a certificate of complete registration, the company was not formed by any deed under the hands and seals of the shareholders, under the 7 & 8 Vict. c. 110: *Held*, that all the pleas were bad. *Pilbrow v. Pilbrow's Atmospheric Railway and Canal Propulsion Company*, 530

16. To a declaration in assumpsit against the defendant as maker of a promissory note, the defendant pleaded that after the making of the note, and after it became due, it was agreed between the plaintiff, the defendant, and one A. B., that the said A. B. should, at the request of the plaintiff, pay to the plaintiff, in trust for E. B., the sum of 200*l*. for her own sole use, or the sum of 25*l*. per annum, so long as the sum of 200*l*. should remain unpaid, to be paid quarterly;

and that the rights and causes of action of the plaintiff upon and in respect of the said note should be suspended, so long as he, the said A. B., should continue to pay the said sum of 6*l.* 5*s.* every quarter. Averment, that A. B. had duly paid the annual sum of 25*l.* quarterly. Replication, traversing the allegation of payments alleged to have been made by the said A. B., of the annual sum of 25*l.* After verdict for the defendant on this issue, and judgment of the Court of Queen's Bench in his favour: *Held*, on error in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, that the plea was bad; as the agreement, although it might properly be the subject of a cross action, was yet no bar to the present action. *Ford v. Beech*, 610

17. A date may be assumed to be material upon demurrer, when, if truly stated, it would support the pleading.

The Court is presumed to have the writ of summons before them on demurrer.

Assumpsit against the defendants as executors of J. B. Plea in abatement of the non-joinder of a co-executrix. The plea stated that the defendants and C. B. were appointed executors and executrix; that the defendants and C. B. duly proved the will, and took upon themselves the burthen of the execution thereof, and that C. B. then administered divers goods and chattels which were of J. B. at the time of his death, as executrix of the last will and testament of the said J. B. *Held*, on demurrer, that the allegation of probate was only inducement to the averment of administration, and did not render the plea double. *Ryalls v. Bramall and Another, Executors, &c.*, 753

18. Duplicity in a plea in abatement can only be taken advantage of on special demurrer. *Ibid*

19. To a declaration in covenant, stating that the defendant was summoned to answer the plaintiff by virtue of a writ of summons, dated the 21st of March, 1843, the defendant pleaded, first, in bar of the further maintenance of the action, that the first writ with which he had been served was a writ of pluries summons, dated the 21st of October, 1846, and that the said writ was not issued within one calendar month after the expiration of any preceding writ, and no proceedings had been had towards outlawry. That the cause of action did not accrue within twenty years next before the date of such writ; and that the writ was issued more than ten years after the passing of the 3 & 4 Wm. 4, c. 42. Secondly, a similar plea, setting out the various writs in continuation of previous writs, and stating that one of them, dated the 28th of March, 1846, was not entered of record within one calendar month next after the expiration thereof, including the day of such expiration, according to the form of the statute, &c: *Held*, on special demurrer, that the pleas were bad, first, for not alleging positively that the cause of action accrued more than twenty years before the commencement of the suit; and secondly, for being improperly pleaded to the further maintenance of the action.

Although the stat. 2 Wm. 4, c. 39, s. 10, requires a particular mode of issuing and continuing writs, in order to prevent the operation of any Statute of Limitations, the defendant should still plead generally that the cause of action did not accrue within — years before the commencement of the suit; and if the plaintiff replies that the cause of action did accrue within the limited time, he must shew, by a proper record, that all the formalities required by the 10th section have been complied with. *Higgs v. Mortimer*, 756

20. To an action of assumpsit for

money had and received, the defendant pleaded that the money claimed in the declaration had been paid to him and others by the plaintiff as a deposit on shares allotted to him for the formation of a partnership, to carry on a railway scheme; that the ground of the plaintiff's action was that the scheme had not been prosecuted within a reasonable time; that after the passing of the 9 & 10 Vict. c. 28, it was, at a meeting held under that act, resolved that the undertaking should be abandoned, and the affairs of the partnership wound up; that they had not yet been wound up, nor had a reasonable time elapsed for that purpose: *Held* bad, as amounting to non assumpsit. *Owen v. Challis*, 802

PLEA (FRIVOLOUS).

To an action of assumpsit containing one count on a bill of exchange, and another on an account stated, the defendant pleaded generally non assumpsit: *Held*, that the plaintiff was not bound to demur, but might apply to a Judge to set the plea aside. *Robeson v. Ellis*, 403

PLEA (ISSUABLE).

1. To a declaration containing a count by indorsee against indorser of a bill of exchange, and also an account stated, a defendant under terms of pleading issuably, pleaded thus: "And the defendant, by, &c., says, that he did not indorse the bill in manner and form as in the first count mentioned, &c.; and as to the last count, the defendant says that he did not promise," &c. The plaintiff having treated the first plea as non issuable, and signed judgment, the Court set aside the judgment for irregularity. *Bousfield v. Edge*, 99

2. The defendant obtained a rule to plead, amongst other pleas, fourthly, "as to 100*l.* parcel, &c., that, before the commencement of the action, the defendant indorsed and delivered to

the plaintiffs a bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*" The plea delivered as the fourth plea was, as to 100*l.* parcel, &c., that the defendant "for and on account of" the said sum of 100*l.*, indorsed to plaintiffs a bill of exchange, &c., for 100*l.*, drawn by defendant upon and accepted by one T. J., and that the plaintiffs took and received the said bill of exchange "for and on account of" the said sum, parcel, &c., and that the defendant had no due notice of the non payment of the said bill of exchange: *Held*, that the plaintiffs were entitled to sign judgment as for want of a plea. *Hills and Others v. Haymen*, 742

PLENE ADMINISTRAVERUNT.

See REPLICATION, 3.

PRISONER.

A defendant in execution under a writ of extent at the suit of the Crown, who has been taken from prison under an order of the commissioners of excise for the purpose of giving evidence, without any writ or other process being issued, and after giving such evidence, has been re-conveyed back to prison, is not entitled to his discharge; as even assuming it to amount to a voluntary escape, the Crown had power to retake and detain him in custody under the original writ. *Regina v. Renton*, 750

PRIVILEGE (OF PARLIAMENT).

A member of the House of Commons is privileged from arrest under a ca. sa. for forty days before and forty days after each meeting of Parliament. And the privilege is equally applicable to the meeting of a new Parliament after a dissolution, as to the meeting of a Parliament after a prorogation. *Goudy v. Duncombe*, 209.

PROMISSORY NOTE.

PROBATE.

See SCIRE FACIAS, 1.

PROHIBITION.

See COUNTY COURT.

1. On a summons before the Judge of a County Court, the defendant pleaded judgment recovered and execution issued for the same claim. The plaintiff admitted the truth of the plea; but, notwithstanding, the Judge decided in favour of the plaintiff. A prohibition to the County Court was refused, as the decision of the Judge was on a matter within its jurisdiction. *Ex parte Rayner*, 342

2. On motion for a prohibition to the Judge of a County Court: *Held*, that in a proceeding under the 122nd sec. of the 9 & 10 Vict. c. 95, the jurisdiction of the County Court is not ousted by the tenant appearing and shewing cause.

Held also, that the Judge of the County Court has jurisdiction to inquire whether the tenancy was determined by a legal notice to quit, and that his decision on that fact is conclusive, and cannot be questioned on a motion for a prohibition. *Fearon and Another v. Norvall*, 439

PROMISSORY NOTE.

See COUNTY COURT, 10.

DECLARATION, 1.

In an action of debt the declaration stated that defendant made his promissory note, &c., "and thereby promised to pay to the plaintiff Jessie, by name and addition of Miss Jessie Hope, at 10, Duncan Street, Edinbro., the sum of 200l." &c. It was then averred that the said Jessie, while she was sole and unmarried, was always ready, and the plaintiffs since their marriage were always ready, to receive the amount of the said note,

QUO WARRANTO. 841

according to the tenor and effect of the said note, &c.: *Held*, that the note, as pleaded, must be taken on general demurrer, to be payable "at 10, Duncan Street, Edinbro.," and that those words were not part of the description of the female plaintiff. And that, therefore, the declaration ought to have averred specifically a presentment at that particular place, and that such an averment was not implied in the averment of readiness to receive according to the tenor and effect of the note: *Held* also, that the note being non-negotiable, made no difference. *Spindler, and Jessie his Wife, v. Grellett*, 191

PUIS DARREIN CONTINUANCE.

See PAUPER.

QUARTER SESSIONS.

See CERTIORARI, 2.

QUO WARRANTO.

Previous to the passing the 5 & 6 Wm. 4, c. 76, the mayor for the time being, of a borough corporate, named in schedule (A.) of that act, held and exercised the office of coroner also for the borough. Subsequent to that act, the borough petitioned for and obtained a separate Court of Quarter Sessions, and appointed a coroner under the 62nd sect. of that act: *Held*, on motion to obtain the costs of an information in the nature of a quo warranto, brought to try the right to that office, that it was not an "office" within the meaning of 9 Anne, c. 20, s. 5, so as to entitle the relator to costs, on judgment for the crown.

An "office," to come within the meaning of the 9 Anne, c. 20, ss. 1, 4 and 5, must be a corporate office. *The Queen, on the prosecution of Joseph Rogerson v. Thomas Grimshaw*, 249

RAILWAY.

See CORPORATION.
WAIVER, 2.

RATE.

See HIGHWAY.

REJOINDER.

See REJOINING GRATIS.

REJOINING GRATIS.

The plaintiff, on the last day for entering the cause for the assizes, being also the last day within which the defendant had to rejoin, inserted a rejoinder for the defendant, made up the record, and entered the cause for trial. Subsequently, on the same evening, but after the office for entering the records was shut, the defendant delivered a rejoinder differing slightly in form, although in substance the same as that which the plaintiff had inserted for him. The cause was tried, the defendant not attending, and a verdict given for the plaintiff. The Court set aside the record and trial.

Rejoinder gratis only means rejoining without a rule to rejoin, and a defendant has still four days' time within which to rejoin. *Winterbottom v. Lees*, 744

REMANET.

See JUDGMENT (AS IN CASE OF A NONSUIT), 4.

RENT.

See COUNTY COURT, 10.

REPLICATION.

1. Where to trespass quare clausum fregit, the defendant pleads thirty years' enjoyment of a right on the land in which, &c., under the 2 & 3 Wm. 4, c. 71, s. 1, the plaintiff, if he relies on the fact that during part of

RULE (ENLARGED).

those thirty years the land has been held by a tenant for life, or on any other matter of fact not inconsistent with the simple fact of enjoyment, should reply it specially, and not traverse the enjoyment as pleaded. *Pye v. Mumford*, 414

2. In an action on the case by a reversioner for widening, &c., a watercourse, the defendant pleaded a right to the watercourse for twenty years, and that he had of right, as often as required, scoured and widened the watercourse. The plaintiff replied traversing the right to the watercourse, as well as to scour and widen; *Held*, on special demurrer, that the replication was not double. *Peter, Clerk, v. Daniel*, 501

3. Replication to a plea of plene administraverunt by executors, that since plea pleaded, assets had come into their hands: *Held*, bad on demurrer.

The proper course for a plaintiff to pursue, where assets have come into the hands of executors since the commencement of the suit, and they plead plene administraverunt, is to sign a judgment of assets quando acciderint, which, if properly entered up, will reach not only whatever assets may thereafter accrue, but also all which remain in the hands of the executors unadministered at the time of the judgment. *Smith v. Tateham and Another*, 752

4. Where a replication, besides a traverse of matter alleged in the plea concluding to the country, also contained two separate answers to the plea, the Court set aside the replication, except as to the traverse, on a summary application. *Tolson v. The Bishop of Carlisle and Others*, 789

RULE (ENLARGED).

Where a rule is enlarged by consent, it is in the C. P., notwithstanding such consent, the practice to serve the enlarged rule. *Batty v. Marriott*, 477

SCIENTER.

See PLEA, 14.

SCIRE FACIAS.

See INSOLVENT, 2.

1. In a scire facias at the suit of executors, the Court refused to allow judgment by default to be entered up on an affidavit, which omitted to state that probate had been granted; notwithstanding the defendant had notice of the proceedings. *Vogel and Another, Executors of Ann Vogel, deceased, v. Thompson*, 114

2. Execution was issued against several existing members of a banking copartnership, established under the 7 Geo. 4, c. 46, and no satisfaction had been obtained, and grounds were shewn for believing that none of the existing members were solvent; the Court permitted a scire facias to issue against persons who were members at the time of the contract being made, although execution had not been issued against all the existing members; *Wilde, C. J.*, dubitante.

The Court will not shorten the time for shewing cause against a rule for issuing a scire facias on the ground that the three years limited by the statute for proceeding against retired members might expire before execution could issue. *Field v. M'Kenzie, Public Officer*, 172

3. Declaration in scire facias on a judgment recovered against the public officer of a banking company, stated that the defendant, "at the time of such judgment was, and from thence hitherto hath been, and still is, a member of the said copartnership:" *Semble*, that is bad on special demurrer. *Esdaile P. O. v. Trustwell*, 219

4. Where a rule of Court for payment of money is more than a year and a day old, it is not necessary to sue out a scire facias, or to obtain the leave of the Court, before suing out

execution upon it, by virtue of 1 & 2 Vict. c. 110, s. 18.

Therefore, where a rule obtained by a defendant had been discharged with costs, and the costs taxed on the Master's allocatur, and more than a year and a day after the allocatur, the plaintiff issued a ca. sa. upon it: *Held*, on motion to set aside the ca. sa., and to discharge the defendant out of custody, that the proceedings were regular, and that it was not necessary that the plaintiff should have issued a scire facias, or obtained the leave of the Court to issue execution. *In re arbitration between Spooner and Payne*, 310

5. Where a rule for a scire facias under the 7 Geo. 4, c. 46, s. 13, had been granted against persons who had formerly been partners in a banking company, the fact that the plaintiff held a collateral security from the bank, from which, with care, some fruits might be obtained, but which had not been mentioned on the application to obtain the rule, was held to be no ground for setting it aside. *Field v. M'Kenzie, Public Officer*, 348

6. A writ of scire facias on a judgment recovered against a public officer of a banking company, under the 7 Geo. 4, c. 46, alleged that C. S. F., "at the time of the commencement of the said action in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment was, and from thence continually has been, and still is, a member of the said co-partnership." The writ having been issued without the leave of the Court; the Court quashed it, on the ground that the plaintiff might obtain execution under it against the said C. S. F., as being a member at the time of judgment recovered," although the leave of the Court to issue the writ had not been obtained. *The Governor and Company of the Bank of Scotland v. Fenwick*, 377

844 SEQUESTRATION.

SCOTCH BANKRUPT.

See BANKRUPT (Scotch).

SECURITY FOR COSTS.

1. The Court refused to grant a rule, in an action of tort, compelling the plaintiff to give security for costs on the ground of his insolvency; no ground being shewn for believing that the action was prosecuted for the benefit of the plaintiff's assignee. *Stead v. Williams and Others*, 497

2. A cause was removed by certiorari from the Court of the Lord Mayor of London. The defendant paid a sum of money into Court, in lieu of bail, and shortly afterwards obtained a rule for security for costs on the ground that the plaintiff resided out of England. The security for costs was never given, and a period of nearly two years elapsed without any proceeding in the cause. The Court, under these circumstances, made absolute a rule calling on the plaintiff to give security for costs within a fortnight; otherwise the defendant to be at liberty to take the money paid in, in lieu of bail, out of Court. *Tassie v. Kennedy*, 587

SEQUESTRATION.

See INSOLVENT, 1.

A writ of sequestration on a judgment debt, at the suit of the plaintiffs, had issued in April, 1834, upon which the bishop had granted his warrant of sequestration. On the 1st of October, 1838, the 1 & 2 Vict. c. 110, s. 17, took effect. In December, 1839, and in September, 1840, other writs of sequestration at the suit of other parties were sued out, and were in the hands of the bishop to execute: *Held*, that this Court would not order the bishop to hand over the first mentioned writ in order that the plaintiffs might indorse it, to levy the interest as well as the debt. *Watkins and Others v. Tarpley, Clerk*, 226

SEVERAL COUNTS.

SET-OFF.

See PARTICULARS.

SET-OFF (OF COSTS).

See AMENDMENT, 1.

SEVERAL COUNTS.

1. In an action of assumpsit, the first count stated, that in consideration of the plaintiff having, at the defendant's request, contracted to sell to H. certain shares of which defendant was the registered holder, defendant promised to deliver to plaintiff all new shares allotted in respect of the shares so sold, as long as defendant continued to be registered holder, and to indemnify plaintiff from all loss sustained by reason of any breach of the former promise. Breach, that certain shares were allotted to defendant, which he would not deliver, and that by reason thereof plaintiff was obliged to lay out a large sum of money in the purchase of other similar shares in order to fulfil his own contract:

Held, that such a count might be joined with a count for money paid, and was not an apparent violation of the Reg. Gen., Hil. Term, 4 Wm. 4, pt. II. r. 5. *Simpson v. Rand*, 389

2. A declaration contained two counts. The first count was on an agreement by the defendant to take the plaintiff into his service for six months, and if when that period expired there was no just cause shewn to the contrary, to enter into another agreement for a further engagement for two years. Breach, that although at the expiration of the said six months, no just cause was shewn to the contrary, the defendant refused to enter into a further agreement for two years. The second count stated that the plaintiff had been in the service of the defendant for the space of six calendar months, and the defendant promised to enter into an agreement for two years more. Breach, that the

defendant refused to continue him in such service: *Held*, that the two counts were evidently founded on the same agreement, and, therefore, amounted to a breach of rule 5 of the pleading rules of Hilary Term, 4 Wm. 4, Pt. II. *Smith v. Thompson*,

524

3. A declaration in case for the infringement of a copyright contained three counts; the first and second founded on the 5 & 6 Vict. c. 45, and the third on the common law; the copyright being the same in all. The Court compelled the plaintiff to make his election between the two first counts and the last: as the cause of action, contained in the last count, might be given in evidence under either of the former. *Boozey v. Tol-kien*,

549

4. The Court refused to allow a plaintiff to retain in his declaration a count in trespass in the ordinary form, for breaking and entering the plaintiff's premises, together with a count under the 2 Wm. & M. sess. 1, c. 5, s. 5, to recover double the value of goods improperly distrained. *Hoare v. Lee*,

765

SEVERAL MATTERS.

The defendant, after appearing by attorney, obtained an order to plead together, her coverture in bar and the Statute of Limitations. She pleaded those pleas accordingly. They were afterwards set aside by a Judge at Chambers, on the ground that they ought not to have been pleaded together, as coverture ought not to be pleaded after appearance by attorney. The defendant then, without any fresh appearance or order to plead several matters, delivered pleas of coverture to the two first counts, and the Statute of Limitations to the whole declaration. The plaintiff thereupon signed judgment for want of a plea. That judgment having been set aside by Judge's order, with costs, *Held*, upon applica-

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tion to rescind that order, that the judgment was improperly signed, as the order to plead several matters did not bind the defendant to plead each plea to the whole declaration, and the order setting aside the former pleas did not make a new rule to plead several matters necessary. *Fryer v. Andrews*,

221

SEVERAL PLEAS.

Where a plaintiff had countermanded notice of trial, and it did not appear that he would be delayed in proceeding to trial in consequence of the defendant adding a plea, the Court permitted him to add one, to the effect that the plaintiff was not a broker duly licensed in pursuance of the 6 Ann. c. 16, s. 4. *Field v. Sawyer*,

777

SHERIFF.

Where a sheriff's officer takes more than the fees allowed under 7 Wm. 4 & 1 Vict. c. 55, for executing a writ, the rule may call upon the sheriff to shew cause why he should not return the excess, as well as upon his officer to shew cause why a writ of attachment should not issue against him, for his contempt in receiving the excess.

Where the excess complained of was charging for remaining in possession a longer time than was necessary, and for more men than were necessary to keep possession, and the affidavits were contradictory; the Court referred the matter to the Master for his report. *Blake v. Newburn*,

601

SPECIAL CASE.

Where a special case has been stated in pursuance of the 3 & 4 Wm. 4, c. 42, s. 25, the Court will not hear it argued if it contains a clause that the Court may draw such inferences as a jury might draw, and the parties to be at liberty to turn the special case into a special verdict.

I I I

D. & L.

846 TAXATION (NOTICE OF).

Engstrom and Others v. Brightman and Others, 499

STAMP.

See BILL OF EXCHANGE.

STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

STAYING PROCEEDINGS.

The Court will not, in an action against sureties on a bond, stay proceedings as to certain breaches, on payment into Court of the amount admitted to be due on those breaches, so as to enable the defendant to try the question of liability on other breaches. *Kepp v. Wiggett and Another*, 164

SUGGESTION.

See COUNTY COURT, 2.

COURT OF REQUESTS.

JUDGMENT (AS IN CASE OF A NONSUIT), 3.

SUMMONS.

See PLEA, 17.

SUPERSEDEAS.

See AUDITA QUERELA.

SURETY.

See PLEA, 13.

STAYING PROCEEDINGS.

TAXATION (NOTICE OF).

See ALLOCATUR.

ATTORNEY (BILL OF).
PLEA, 5.

A notice of taxation, dated 23rd February, for "*to-morrow*," was put through the door of the office of the plaintiff's attorney between seven and eight o'clock in the evening of the 24th, no one being in attendance. The clerk on receiving it the next

VARIANCE.

day, supposed from the date of the notice that the time for taxation had passed: *Held*, no ground for reviewing the taxation, and that the notice was sufficient. *Grant v. Mackenzie*, 129

TENDER.

See PLEA, 8.

TIME.

See PLEA, 1.

TIPPLING ACT.

See DE INJURIA.

TRESPASS.

See COSTS.

TRUSTEE.

See GUARDIAN AND WARD.

USE AND OCCUPATION.

See COUNTY COURT, 8.
PLEA, 3, 10.

USURY.

See PLEA, 4.

VACATION.

See WRIT OF INQUIRY.

VARIANCE.

1. Where the writ and commencement of the declaration were in debt, and the first count in the declaration might be in debt or assumpsit, but the second was in assumpsit; the Court set aside the declaration as varying from the process. *Moore v. Foster*, 352

2. Where a bill of lading stipulates on the face of it for payment of demurrage, the indorsee, taking goods under it, is liable for demurrage.

Assumpsit. The declaration recited that certain goods had been

shipped on board the plaintiff's vessel by Messrs. R. & Co., to be delivered in this country according to the terms of the bill of lading, to the order of R. & Co., or their assigns paying freight and 2*l.* 10*s.* per day demurrage over four working days: it averred that R. & Co. indorsed and assigned over the bill of lading to the defendants; and that "in consideration of the premises, and that the plaintiff at the request of the defendants would deliver unto the defendants as such indorsees and assignees as aforesaid, and would suffer and permit them to take the said cattle bones according to the terms of, and agreeably to, the bill of lading; the defendants then promised the plaintiff to accept and take the said cattle bones on the terms and conditions contained in the said bill of lading," and to clear the vessel within four days, or pay 2*l.* 10*s.* for each day beyond for demurrage. That although plaintiff was ready and willing to deliver, and permitted the defendants to take, and defendants did take the cattle bones; yet the defendants did not discharge the vessel within four working days, but detained her three days beyond, whereby the plaintiff was put to great costs and charges, &c., and a large sum of money became due to the plaintiff, by way of demurrage, which the defendants had not paid, &c., to the plaintiff's damage, &c.

At the trial, the plaintiff proved all the facts stated in the declaration except an express promise by the defendants: *Held*, that the facts proved warranted the jury in finding that the defendants did promise; and, therefore, that the evidence supported the declaration.

The improper reception of evidence when the fact is fully proved aliunde, is no ground for a new trial.

Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration. *Stindt v. Roberts and Another*, 460

3. To a declaration in trover for hops, the defendants pleaded, that just before, &c., and until, &c., M. & Co. were possessed of the hops as of their own property, and casually lost them, and that immediately thereupon they came, by finding, to the possession of E., who immediately thereupon sold them to the plaintiff, whereupon and immediately before the time, &c., the defendants retook them, as servants to M. & Co., and for their use. Replication de injuriâ. *Held*, upon the issue so raised, that the defendants could succeed only by proving possession in M. & Co. at the time of the alleged conversion; and, therefore, that evidence was admissible on the part of the plaintiff, to shew that M. & Co. had sold the hops to the person under whom he claimed.

To the same declaration a similar plea was pleaded, only alleging a different person in addition to E., through whose hands the hops were alleged to have passed, but not alleging the possession of M. & Co. down to the time of the plaintiff's conversion: *Held*, that similar evidence in answer to this plea was admissible to shew that M. & Co. had sold the hops to the person under whom the plaintiff claimed, as this plea also must be construed as alleging a continuing possession in M. & Co. at the time of the conversion complained of. *Eyre v. Scovell and Others*, 516

VENUE.

1. In an action on a banker's cheque, the venue cannot be changed on the common affidavit. *Webb v. Inwards*, 478

2. Until issue is joined, the Court will not grant a rule for changing the venue, on the ground that the witnesses on both sides in the cause reside in a county different from that in which the plaintiff has laid the venue. *Hodge v. Churchyard*, 514

3. The Court refused to change

the venue after issue joined and notice of trial given, where it was not shewn in the affidavit in support of the application that the change would not be inconvenient to the plaintiff, or in what respect it would be productive of convenience to the defendant. *Hams v. Pawlett*, 780

VENIRE FACIAS.

See AUDITA QUERELA, 1.

WAGER.

Notwithstanding the provisions of the 8 & 9 Vict. c. 109, s. 18, a sum deposited with a shareholder to abide the event of a trotting match, may be recovered by the depositor, who has repudiated the wager and demanded his money before the match is decided; and *semble*, that in order to raise the objection on the section, it ought to be pleaded specially. *Varney v. Hickman*, 364

WAIVER.

See COUNTY COURT, 4.

INSOLVENT, 2.

NULLITY, 1.

WARRANT OF ATTORNEY, 3.

1. The direction in respect of the interest of the sheriff, in the 39th section of the Lands' Clauses Consolidation Act (8 & 9 Vict. c. 18), is introduced for the protection of the party against whom the interest would operate, and he may therefore waive the protection if he so elects. *Ex parte Baddeley*, 575

2. A railway company having issued their warrant to the sheriff to summon a jury to assess compensation, under the 8 & 9 Vict. c. 18, s. 39, the undersheriff before whom the inquisition was to be taken, informed the party whose land was to be assessed, that he, the undersheriff, was a shareholder in the railway company. *Held*, that as the party did not object, but proceeded with the inquisition before the undersheriff, he must be taken to

WARRANT OF ATTORNEY.

have waived any objection arising from the interest of the undersheriff under the statute. *Ibid*

WAGES.

See WORK AND LABOUR.

WARRANT OF ATTORNEY.

1. It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf; it is sufficient if, of his own free will, he adopts an attorney suggested by the plaintiff.

Nor is it necessary that the attorney should be cognizant of the facts under which the warrant of attorney is given, or that he should consult with the defendant in private, previous to signing; it is enough if the attorney be there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withhold from the attorney the necessary information.

Where judgment had been signed on a warrant of attorney, the defeazance of which did not contain the true terms of the agreement upon which it was to be void, pursuant to Reg., M. T., 42 Geo. 3; and the judgment appeared to have been signed before certain bills of exchange, for which it was given as collateral security, had become due; the Court referred it to the Master to ascertain what was due to the plaintiff, and ordered that upon payment of that sum, and the costs of the proceedings, the bills of exchange should be delivered up to the defendant, and satisfaction should be entered on the judgment.

The omission to comply with the Reg., M. T., 42 Geo. 3, which requires the attorney preparing the warrant of attorney to cause the "defeazance to be written on the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to

be made on such warrant of attorney, containing the substance and effect of such defeazance," does not render the warrant void as between the parties.

Joel v. Dicker, 1

2. On a motion to enter up judgment on an old warrant of attorney, an affidavit that the deponent has seen the defendant alive within three months, and that he is now residing at Paris, is insufficient; unless it also state that his residence there is unknown. *Tripp and Another, Executors of Skrine, v. Sir W. T. S. Massey Stanley, Bart.,* 262

3. A party may, by the terms of the warrant of attorney, waive the necessity of an affidavit being made, of his having been recently seen alive, in order to obtain leave to enter up judgment after a year and a day have elapsed. *Ibid*

4. A deed or other writing must be taken to speak from the time of its execution, and not from the date apparent on the face of it.

Therefore, where a warrant of attorney, under seal, bore date the 24th of February, 1847, but was not executed till the 20th of March, or delivered over to the plaintiff until the 29th of March, and the defeazance was for the payment of the principal sum "on the 20th of March next;" and the plaintiff issued execution on the 30th of March; it was held that the execution was premature, and must be set aside.

Upon motion to set aside a warrant of attorney, the Court will not determine, upon affidavit, the question of whether or not it has been given by way of fraudulent preference.

An execution for more than the sum really due, but not for more than the sum authorized by the warrant of attorney, will only be set aside pro tanto for the excess. *Browne v. Burton,* 289

5. On motion to enter up judgment on an old warrant of attorney, it

appeared that the warrant of attorney, which was joint, was given to A. B. and C. D., "public officers of the Yorkshire Banking Company," but not to them as public officers. The defeazance shewed that the object of the warrant of attorney was to secure to the plaintiffs, as public officers, money therein expressed to have been lent by them as public officers to defendants, and such further sum as the banking company might advance. The affidavits shewed the original debt to be unpaid, and a further sum to have been advanced by the banking company, but did not allege the debt to be still owing to the plaintiffs, one of them having ceased to be a public officer. The Court permitted the banking company to enter up judgment in the names of A. B. and C. D. as individuals.

The affidavit stated that the deponent believed the defendants to be alive, having seen and conversed with two of them, and "been in company with" the third on a recent day: *Held* sufficient. *Howard and Another v. Batho and Others,* 396

6. A warrant of attorney was attested in the following form:—"Signed," &c., "by the said J. K., in the presence of W. K. T., one of the attorneys of her Majesty's Court of Queen's Bench at Westminster, and attorney on behalf of the said J. K., expressly named by him, and attending at his request to inform him, and I did inform him, of the nature and effect of the above written warrant of attorney before the same was executed by him, and I declare myself to be the attorney for the same J. K., W. K. T." *Held* sufficient, *Holt and Another, Assignees, &c. v. Kershaw,* 419

7. The attestation to a warrant of attorney was as follows:—"Signed, sealed, and delivered by the said H. H., in my presence, and I declare myself to be the attorney for the said

H. H., and that I subscribe as such attorney, G. O., solicitor." *Held* sufficient.

Where goods were vested in trustees for the benefit of infants, but the trustees declined to act, and the grandmother of the infants, with whom they were living, took away part of the goods, but permitted the rest to remain in the possession of the stepfather, on his giving a warrant of attorney; the Court refused to set aside the warrant of attorney, on the ground of want of consideration.

Semble, that the Court will not set aside a warrant of attorney upon motion, even if a total want of consideration appears. *Gay v. Hall*, 422

WATERCOURSE.

See REPLICATION, 2.

WRIT OF INQUIRY.

WIDOW.

See GUARDIAN AND WARD.

WORK AND LABOUR.

A claim for a month's wages by a menial servant on dismissal without warning and without cause, cannot be recovered under the common indebitatus count for work and labour. *Fewings v. Tindal*, 196

WRIT OF INQUIRY.

A writ of inquiry, in a personal action, may be tested in Vacation, under the 2 Wm. 4, c. 39, ss. 11 and 12. *Collett v. Curling*, 605

END OF VOL. V.

